No. 15-278

IN THE

Supreme Court of the United States

AMGEN INC., *et al.*,

Petitioners,

v.

STEVE HARRIS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BROOK HOPKINS
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State St.
Boston, MA 02109

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
LOUIS R. COHEN
ALBINAS J. PRIZGINTAS
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTIONS PRESENTED

1. Whether the decision below conflicts with *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459 (2014), as four members of the court of appeals concluded in dissenting from the denial of rehearing en banc.

2. Whether the Ninth Circuit erred in extending (sua sponte, and without the benefit of briefing) the presumption of indirect class-wide reliance that this Court approved for securities claims in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), to respondents' claims under ERISA.

PARTIES TO THE PROCEEDINGS

Defendants-appellees in the court of appeals, who are petitioners here, are Amgen Inc.; Amgen Manufacturing, Limited; Jacqueline Allred; David Baltimore; Charles Bell; Frank J. Biondi, Jr.; Raul Cermeno; Jerry D. Choate; Jackie Crouse; Frederick W. Gluck; Frank C. Herringer; Michael Kelly; Lori Johnston; Gilbert S. Omenn; Judith C. Pelham; Leonard D. Schaeffer; Kevin W. Sharer; the Amgen Plan Fiduciary Committee; and the AML Plan Fiduciary Committee.

Plaintiffs-appellants in the court of appeals, who are respondents here, are Steve Harris, Albert Cappa, Donald Hanks, Dennis Ramos, and Jorge Torres.

CORPORATE DISCLOSURE STATEMENT

Amgen Inc. does not have a parent corporation and no publicly held company owns ten percent or more of its stock. Amgen Manufacturing, Limited is a wholly owned subsidiary of Amgen Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Amgen Inc. *et al.* respectfully petition for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, along with its order denying rehearing en banc and the concurrence in and dissent from that order (App. 1a-57a), are published at 788 F.3d 916. The court's opinion replaced a prior one, which is reported at 770 F.3d 865. The district court's opinion dismissing the operative complaint (App. 59a-75a) is unreported; its opinion dismissing the previous complaint (App. 77a-108a), which was incorpo-

rated by reference into the opinion dismissing the operative complaint, is also unreported but is available at 2010 WL 744123.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 2014. The court filed an amended opinion and denied petitioners' timely petition for rehearing en banc on May 26, 2015. On August 17, Justice Kennedy extended the time within which to file this petition, to and including September 3, 2015. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§1001 *et seq.*), are reproduced in the Appendix.

STATEMENT

A. Statutory Background

1.a. The Employee Retirement Income Security Act of 1974 (ERISA) sets standards for employee-retirement plans established by private companies, "such as when and how pensions vest." *Varity Corp.* v. *Howe*, 516 U.S. 489, 496 (1996). The act also "establish[es] standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." 29 U.S.C. §1001(b). In particular, ERISA imposes duties of loyalty and prudence, requiring a fiduciary to "discharge his duties with respect to a plan solely in the interest of [his] participants and beneficiaries" and to act "with the care, skill, prudence, and diligence ... that a prudent man ... familiar with such matters would use."

Id. §1104(a)(1), (a)(1)(B). The statute authorizes plan participants to sue fiduciaries who breach these duties. *Id.* §1132(a)(2)-(3).

One type of retirement plan that ERISA covers is an "individual account plan," also known as a defined-contribution plan. *See LaRue* v. *DeWolff, Boberg & Assocs.*, 552 U.S. 248, 250 n.1 (2008) (discussing such plans). A common form of individual account plan is an "employee stock ownership plan," or ESOP. 29 U.S.C. §1107(d)(3)(A)(ii). ESOPs are "designed to invest primarily in" the stock of the plan participant's employer. *Id.* §1107(d)(6)(A).

b. As part of the statutory obligation to act prudently in administering retirement plans, ERISA normally requires fiduciaries to "diversify[] the investments of [a] plan so as to minimize the risk of large losses." 29 U.S.C. §1104(a)(1)(C). There is an exception to this requirement, however, "[i]n the case of an eligible individual account plan," or EIAP. *Id.* §1104(a)(2). For EIAPs—of which ESOPs are one type—ERISA provides that "the diversification requirement ... and the prudence requirement (only to the extent that it requires diversification)" are "not violated by [the] acquisition of or holding of ... qualifying employer securities." *Id.*

This exception serves Congress's purpose of "encourag[ing] the creation of ESOPs" in order to foster employees' investment in their employers. *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2470 (2014); *see also* Tax Reform Act of 1976, Pub. L. No. 94-455, §803(h), 90 Stat. 1520, 1590 (noting Congress's interest in "encouraging employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system"). At the same time, the di-

versification exception "places employee retirement assets [in ESOPs] at much greater risk than does the typical diversified ... plan." *Lanfear* v. *Home Depot, Inc.*, 679 F.3d 1267, 1278 (11th Cir. 2012) (internal quotation marks omitted), *abrogated on other grounds by Fifth Third*, 134 S. Ct. at 2463. This, in turn, makes fiduciaries of those plans "uniquely vulnerable" to claims under ERISA. App. 11a (Kozinski, J., dissenting from denial of rehearing en banc (hereafter Kozinski dissent)).

2. Recognizing the tension between Congress's goals of increasing employees' ownership stake in their companies and safeguarding their retirement benefits, all seven courts of appeals to address the issue construed ERISA to provide a "presumption of prudence" that limited the circumstances in which an ESOP fiduciary could be held liable under the statute for acting (or failing to act) with respect to the plan. *E.g.*, *Moench* v. *Robertson*, 62 F.3d 553, 571 (3d Cir. 1995), *abrogated by Fifth Third*, 134 S. Ct. at 2463. As discussed below, this Court concluded in *Fifth Third Bancorp* v. *Dudenhoeffer* that ERISA creates no such presumption. *See* 134 S. Ct. at 2467-2471. At the same time, the Court "recognized that, without ... a presumption, [ESOP] fiduciaries were at acute risk of liability." App. 11a (Kozinski dissent). Thus, in place of the presumption, this Court "stressed the special importance of the motion to dismiss to 'weed out meritless lawsuits,'" and accordingly "crafted new and daunting liability requirements that plaintiffs must plausibly allege are met in order to state a claim." *Id.* at 11a-12a (quoting *Fifth Third*, 134 S. Ct. at 2470).

B. District Court Proceedings

1.a. Petitioner Amgen Inc. discovers, develops, manufactures, and delivers therapeutics used to treat patients suffering from a number of serious illnesses. Other petitioners include the two committees that oversee Amgen's retirement plans, six individuals who served on those committees during the putative class period, and eight outside Amgen directors. The remaining petitioners are Amgen's former CEO and an Amgen subsidiary, Amgen Manufacturing, Limited (AML).

Respondents are former Amgen Inc. and AML employees who participated in Amgen-sponsored retirement plans during their employment. These plans allow employees to contribute a portion of their income to individual investment accounts. Employees can opt to invest their contributions in any of several funds, including one that holds only Amgen stock. Because that fund is an ESOP, *see* App. 20a, ERISA's diversification exception applies to it.

b. In 2007, after a decline in the price of Amgen's stock, respondents brought this putative class action under ERISA. They allege that petitioners marketed two anemia drugs for so-called off-label use despite allegedly knowing that such use was unsafe, and also concealed negative results from studies of one of the drugs. Respondents further allege that Amgen's stock declined when these off-label marketing activities and test results became public, causing the value of respondents' retirement accounts to fall. These allegations parallel those in a still-pending securities case that had previously been brought against Amgen, and was before this Court in *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

Respondents' operative complaint asserts six causes of action under ERISA, two of which (Counts II and III) are relevant here. In Count II, respondents charge that petitioners breached the statutory duty of prudence, *see* 29 U.S.C. §1104(a)(1)(B), by failing to act on non-public information about Amgen, information that petitioners allegedly had by virtue of being company insiders. First Am. Compl. ¶¶338-342. Specifically, respondents charge that petitioners breached their duty by permitting plan participants to continue investing in Amgen stock when they knew or should have known—because they had inside information regarding the alleged off-label marketing activities and negative test results—that such investment was imprudent. *Id.* ¶343. Respondents allege that ERISA required petitioners to act on that inside information to prevent losses to the fund, by either freezing additional investment in company stock or disclosing the inside company information to the public. *Id.* ¶344. The complaint acknowledges, however, that a freeze "would have sent a negative signal to Wall Street analysts, which in turn would result in reduced demand for Amgen Stock and a drop in the stock price." *Id.* ¶330.

In Count III, respondents charge a violation of ERISA's duty of loyalty, 29 U.S.C. §1104(a)(1), alleging that petitioners breached a "duty to deal candidly" with plan participants. First Am. Compl. ¶353. In particular, respondents allege that petitioners failed to provide them with "complete and accurate" inside information bearing on the value of Amgen's stock. *Id.* ¶354.

2. The district court (which had jurisdiction under 28 U.S.C. §1331 and 29 U.S.C. §1132(e)(1)) dismissed respondents' original complaint on standing and other non-merits grounds, but the Ninth Circuit reversed. *Harris* v. *Amgen, Inc.*, 573 F.3d 728, 737-738 (9th Cir.

2009). On remand, the district court dismissed respondents' complaint without prejudice under Federal Rule of Civil Procedure 12(b)(6). App. 77a-108a. Respondents then amended the complaint, but the court again dismissed (this time with prejudice), incorporating its prior opinion in holding that respondents' amendments had not cured the infirmities the court had identified. *Id.* at 59a-75a.

C. Pre-*Fifth Third* Ninth Circuit Proceedings

The Ninth Circuit again reversed. *Harris* v. *Amgen, Inc.* (hereafter *Harris I*), 738 F.3d 1026 (9th Cir. 2013) (subsequent history omitted). As to respondents' duty-of-prudence claim (Count II), the court ruled that the then-valid presumption of prudence did not apply. *Id.* at 1036-1039. Next, analyzing the claim under the "prudent man" standard (i.e., without the presumption), the court concluded that *some* petitioners' purported knowledge of and participation in the alleged misrepresentations and omissions sufficed to state a claim under ERISA against *all* petitioners. *Id.* at 1039-1042. With respect to the specific steps that respondents alleged petitioners should have taken, the court of appeals agreed with petitioners that because of insider-trading laws, fiduciaries are not required to sell company stock based on inside information. *Id.* at 1041. But it held that petitioners could have either disallowed further investment in Amgen stock by plan participants, or disclosed the relevant non-public information—which most petitioners were not authorized by the company to reveal—to the general public. *Id.* at 1041-1042.

The Ninth Circuit acknowledged that a freeze on investment in company stock, "may well have caused a drop in the share price." *Harris I*, 738 F.3d at 1041. It

asserted, however, that "several factors mitigate this effect," including "that the ultimate decline in price would have been no more than the amount by which the price was artificially inflated," *id.*—an assertion that appears nowhere in respondents' complaint.

Turning to respondents' duty-of-loyalty claim (Count III), the Ninth Circuit, as relevant here, rejected the district court's conclusion (*see* App. 74a, 103a-105a) that the claim was precluded by respondents' failure to plead detrimental reliance. *Harris I*, 738 F.3d at 1043. The court of appeals observed that this Court has allowed securities-fraud class-action plaintiffs who bought or sold stock during the class period to invoke a rebuttable presumption of indirect reliance, based on the "fraud-on-the-market" theory. *Id.* (citing *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988)). Without further explanation, the court of appeals then concluded: "We see no reason why ERISA plan participants who invested in a Company Stock Fund whose assets consisted solely of publicly traded common stock should not be able to rely on the fraud-on-the-market theory in the same manner as any other investor[.]" *Id.* Respondents had not argued at any prior point in this litigation that *Basic* should be extended from the securities context to this ERISA case—in which no plaintiff is alleged to have traded Amgen shares during the class period.

D. Proceedings In This Court

Amgen petitioned for certiorari, arguing (as relevant here) that this Court should hold the case pending its decision in *Fifth Third*. *See* Pet. 22-23, *Amgen Inc.* v. *Harris*, No. 13-888 (U.S. Jan. 21, 2014). The plaintiffs in *Fifth Third* had advanced an "underlying legal theory ... functionally identical" to the one here: that fiduciaries of a company-retirement plan breached

ERISA's duty of prudence by failing to act on inside information. App. 12a (Kozinski dissent).

While Amgen's petition was pending, this Court decided *Fifth Third*. The Court first rejected the lower court holdings that ERISA creates a presumption of prudence. 134 S. Ct. at 2463. Instead, the Court held, the "important task" of "weed[ing] out meritless lawsuits" should be accomplished "through careful, context-sensitive scrutiny of a complaint's allegations" under Rule 12(b)(6). *Id.* at 2470. The Court then established a new pleading (and hence liability) standard for complaints alleging that ERISA fiduciaries breached their duty of prudence by failing to act on inside company information. *Id.* at 2472-2473.

To state such a claim, this Court instructed, "a plaintiff *must* plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." *Fifth Third*, 134 S. Ct. at 2472 (emphasis added). The Court then set forth "three points [that] inform the requisite analysis." *Id.*

First, ERISA does not require insider trading in violation of the securities laws. *See Fifth Third*, 134 S. Ct. at 2472. *Second*, when a complaint alleges (as here) that a fiduciary should have publicly disclosed inside information or refrained from purchasing stock, the court should consider whether such action would have "conflict[ed] with complex insider trading and corporate disclosure requirements imposed by the federal securities laws, or with the objectives of those laws." *Id.* *Third*, the court should consider "whether the complaint has plausibly alleged that a prudent fidu-

ciary in the defendant's position *could not* have concluded" that the proffered alternative actions "would do more harm than good." *Id.* at 2473 (emphasis added).

After deciding *Fifth Third*, this Court granted Amgen's petition, vacated the Ninth Circuit's judgment, and remanded for further consideration in light of that decision. *See Amgen Inc.* v. *Harris*, 134 S. Ct. 2870 (2014).

E. Post-*Fifth Third* Proceedings

1. On remand, the Ninth Circuit rejected petitioners' suggestion to return the case to the district court so that respondents could seek leave to amend their complaint in order to satisfy *Fifth Third*'s pleading standard. Instead, the court of appeals re-issued its opinion with only minor changes. *Compare Harris I*, 738 F.3d at 1039-1042, *with Harris* v. *Amgen, Inc.* (hereafter *Harris II*), 770 F.3d 865, 875-879 (9th Cir. 2014) (subsequent history omitted).

2.a. Petitioners petitioned for rehearing en banc, arguing that the Ninth Circuit's decision conflicted with *Fifth Third*. The court denied rehearing but issued a further amended opinion. App. 2a.

In that opinion, the court continued to hold that respondents had stated a valid duty-of-prudence claim. The court deemed respondents' claim sufficient because "[i]t is ... quite plausible ... that defendants could remove the [ESOP] Fund from the list of investment options without causing undue harm to plan participants," App. 41a; *accord id.* at 42a—despite the absence of any such allegation in the complaint, *see id.* at 13a (Kozinski dissent). The court also concluded that petitioners could have publicly disclosed the alleged inside information. *Id.* at 42a-43a. But it did not analyze whether

any prudent fiduciary could have concluded under the circumstances that such disclosure would do "more harm than good." *Fifth Third*, 134 S. Ct. at 2472.

As for respondents' duty-of-loyalty claim, the court's analysis included minor changes but was substantively identical in pertinent part to the prior opinion. *Compare Harris II*, 770 F.3d at 879-882, *with* App. 45a-50a.

b. Judge Fletcher, author of the panel's opinions, concurred in the denial of rehearing en banc, asserting that the four dissenters from that denial had mischaracterized the panel's opinion in various ways. App. 3a-9a.

c. Judge Kozinski, joined by Judges O'Scannlain, Callahan, and Bea, dissented from the denial of rehearing en banc. App. 9a-20a.

The dissent began by observing that the "Supreme Court has previously admonished us for ignoring a grant, vacate and remand (GVR) order and 'reinstating [our] judgment without seriously confronting the significance of the cases called to [our] attention.' We're at it again." App. 9a (alterations in original) (quoting *Cavazos* v. *Smith*, 132 S. Ct. 2, 7 (2011)).

Specifically, Judge Kozinski explained, *Fifth Third* "created stringent new requirements for plaintiffs who sue fiduciaries under ERISA for imprudent investment in an employer's stock." App. 9a. Yet "in response to a GVR," he continued, "the panel not only fails to give effect to those requirements, but also insulates our circuit law from important aspects of the Supreme Court's holding." *Id.*

According to the dissenters—who viewed the case as presenting a "matter of exceptional importance,"

App. 18a—the panel's decision conflicted with "*Fifth Third*'s special emphasis on Rule 12(b)(6)," and, relatedly, "fundamentally undermines *Iqbal* and *Twombly*." *Id.* at 14a; *see also id.* at 13a, 16a; *infra* p.17 n.*. In the dissenters' view, "the panel's reasoning render[ed] meaningless crucial language in *Fifth Third*, in open disregard for the intent behind the Supreme Court's GVR order." *Id.* at 14a. In particular, under the panel's rationale, "a fiduciary now can *never* be safe from a lawsuit if he fails to withdraw the fund," *id.* at 16a, and must always "immediately disclose inside information," *id.* at 18a.

Warning that the panel's decision would produce dire consequences—"unbounded liability for ERISA fiduciaries" and "acute[] vulnerab[ility]" for companies across the country—the dissenters predicted that "the Supreme Court will promptly correct our error." App. 9a, 10a.

d. On petitioners' opposed motion, the Ninth Circuit stayed the issuance of its mandate pending the filing and disposition of this petition.

REASONS FOR GRANTING THE PETITION

The decision below is doubly flawed. First, the Ninth Circuit adopted a pleading standard for duty-of-prudence claims that directly contradicts *Fifth Third*. Second, the court of appeals erroneously held (sua sponte, and without briefing) that under ERISA, individuals who held company stock but neither bought nor sold it during the class period are entitled to the presumption of reliance adopted in *Basic*, a step no other appellate court has ever taken and one contrary to the bright lines this Court has adopted under the securities laws.

Among other deleterious consequences, these errors would eliminate the latitude that, as *Fifth Third* recognized, ERISA fiduciaries must have when exercising their judgment—often in the face of substantial uncertainty—about how best to serve plan participants. Unless they want to undergo burdensome litigation and risk personal liability based on judicial second-guessing, fiduciaries will be required by the decision below to disclose inside information (which they may not have company authorization to reveal) or freeze further investment in company stock, either of which could cause a price decline that would harm the fiduciary's beneficiaries. The probable result of imposing this choice—between risking harm to beneficiaries by acting on inside information and risking liability by not doing so—is that companies, faced with an explosion of easy-to-maintain litigation, will decline to offer employees an ESOP option in the first place. None of this is the regime Congress envisioned, nor is it one that a faithful application of *Fifth Third* produces. Given the clarity of the Ninth Circuit's errors, summary reversal is warranted.

I. THE NINTH CIRCUIT'S DUTY-OF-PRUDENCE HOLDING CONFLICTS WITH *FIFTH THIRD*

A. *Fifth Third* Adopted A Stringent New Pleading Standard In Lieu Of The Presumption Of Prudence

1. When respondents filed their complaint, several circuits had interpreted ERISA to provide a "presumption of prudence" (sometimes referred to as the *Moench* presumption) that limited the circumstances in which a fiduciary could be liable for violating the duty of prudence with respect to company stock funds. *See Lanfear*, 679 F.3d at 1279 (citing cases); *see also, e.g.*,

White v. *Marshall & Ilsley Corp.*, 714 F.3d 980, 989 (7th Cir. 2013), *abrogated by Fifth Third*, 134 S. Ct. at 2463. Under the presumption, plaintiffs were required to make a heightened showing, one that "would not be required in an ordinary duty-of-prudence case, such as that the employer was on the brink of collapse." *Fifth Third*, 134 S. Ct. at 2463.

The *Moench* presumption was adopted largely to address the dilemma faced by ESOP fiduciaries who become aware of adverse material inside information. Such fiduciaries cannot direct their plans to sell company stock, because that would violate the securities laws. *E.g.*, *United States* v. *O'Hagan*, 521 U.S. 642, 651-652 (1997). They can stop new purchases of company stock, but as the operative complaint here acknowledges, doing that would likely cause the stock price to fall—harming the fiduciaries' beneficiaries. First Am. Compl. ¶330, *quoted supra* p.6. Such a decline, moreover, might well exceed any decline warranted by the non-public information. *See* App. 15a (Kozinski dissent) (a freeze "signals that something is deeply wrong inside a company but doesn't provide the market with information to gauge the stock's true value"). Finally, if a fiduciary imposes a freeze and the stock nonetheless rises (immediately or eventually), the fiduciary could be sued for depriving plan participants of the benefit of that rise. *See Moench*, 62 F.3d at 572 ("[I]f the fiduciary, in what it regards as an exercise of caution, does not maintain the investment in the employer's securities, it may face liability for that caution, particularly if the employer's securities thrive.").

Alternatively, fiduciaries who learn material adverse inside information could publicly disclose it. But the market would likely react negatively to such disclosure, again to the detriment of the fiduciaries' benefi-

ciaries who hold the stock. *Edgar* v. *Avaya, Inc.*, 503 F.3d 340, 350 (3d Cir. 2007), *abrogated on other grounds by Fifth Third*, 134 S. Ct. at 2463. This Court appeared to recognize as much in *Fifth Third*, mandating consideration of whether "a prudent fiduciary in the defendant's position could not have concluded that ... publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." 134 S. Ct. at 2473. Many fiduciaries, moreover—including most petitioners here—are not authorized to publicly reveal inside information, which corporate leadership may have legitimate reasons for not disclosing. *See Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1321 (2011) ("§10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information."). "The securities laws," in other words:

> do not require continuous disclosure of all information that may bear on a stock price. Congress specifically rejected that route because of the enormous transaction costs and inefficiencies such disclosures would create. Instead, it enacted a comprehensive and tessellated statutory scheme for corporate disclosure that imposes obligations on *certain* corporate officers to reveal information at *specific* times.

App. 17a-18a (Kozinski dissent). Requiring disclosure by fiduciaries under ERISA, against the judgment of senior officials, would thus "run the risk of disturbing the carefully delineated corporate disclosure laws." *Baker* v. *Kingsley*, 387 F.3d 649, 662 (7th Cir. 2004).

In sum, "[t]here is no happy solution" to the dilemma faced by company fiduciaries who learn material in-

side information. *Rinehart* v. *Akers*, 722 F.3d 137, 147 (2d Cir. 2013), *granted, vacated, and remanded on other grounds*, 134 S. Ct. 2900 (2014). Any step they take based on such information risks harming their beneficiaries, as does a decision not to take any such steps.

2. *Fifth Third* recognized this problem, observing that ESOP fiduciaries are "between a rock and a hard place" where they "may be sued" under ERISA no matter what they do. 134 S. Ct. at 2470. The Court rejected the presumption of prudence as the solution, however, concluding instead that the "threat of such expensive litigation" and the need to "weed out meritless lawsuits" should be addressed "through careful, context-sensitive scrutiny of a complaint's allegations." *Id.*; *see also id.* ("The proposed presumption ... does not readily divide the plausible sheep from the meritless goats. That important task can be better accomplished through ... scrutiny of a complaint's allegations."). The Court accordingly set out a new, stringent standard for evaluating claims like respondents' at the motion-to-dismiss stage.

Under *Fifth Third*, plaintiffs who assert that ESOP fiduciaries acted imprudently by failing to take steps in light of material inside information "*must* plausibly allege an alternative action ... that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." 134 S. Ct. at 2472 (emphasis added). And critically, when a plaintiff "faults fiduciaries for failing to ... refrain from making additional stock purchases or for failing to disclose [inside] information to the public"—as respondents do—the plaintiff must "plausibly allege[] that a prudent fiduciary in the defendant's position *could not* have concluded that stopping purchases ... or publicly

disclosing negative information would do more harm than good." *Id.* at 2473 (emphasis added). As Judge Kozinski recognized, these are "new and daunting [pleading and] liability requirements." App. 11a-12a.*

B. The Ninth Circuit Applied A Pleading Standard Contrary To *Fifth Third*'s

1. The court of appeals held the operative complaint viable even though respondents do not make the allegations that *Fifth Third* requires (plausibly or otherwise). As explained, respondents allege that petitioners breached their duty of prudence by "offering Amgen stock as an investment option ... when it was no longer a prudent retirement investment," which petitioners allegedly knew or should have known because they had various pieces of non-public information. First Am. Compl. ¶338. Respondents further allege that petitioners should have made "appropriate disclosures" of this non-public information or "preclud[ed] additional investment in [Amgen] Stock. *Id.* ¶344. The complaint does not allege, however, that "a prudent fiduciary in the defendant's position could not have concluded that stopping purchases ... or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price." *Fifth Third*, 134 S. Ct. at 2473.

On remand, the panel recited that standard, *see* App. 39a, but it then applied a conflicting one. Specifi-

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* The Court described the new requirements as a supplement to the general civil-litigation pleading standards articulated in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007). *See Fifth Third*, 134 S. Ct. at 2471 (courts should "apply the pleading standard as discussed in *Twombly* and *Iqbal* in light of the following considerations").

cally, the court deemed respondents' complaint sufficient because "[i]t is ... *quite plausible* ... that [petitioners] could remove the Fund from the list of investment options without causing undue harm to plan participants." *Id.* at 41a (emphasis added); *accord id.* at 42a; *see also id.* at 5a (Fletcher, J., concurring in denial of rehearing en banc) (stating that in a case like this, "it is plausible to conclude that the withdrawal of the fund will result in a net benefit ... to plan participants"). What a court in hindsight deems "quite plausible," however, is not the standard; again, *Fifth Third* requires plausible allegations that "a prudent fiduciary in the defendant's position could not have concluded" that a proposed alternative action would have done "more harm than good," 134 S. Ct. at 2473. Respondents make no such allegations.

By allowing a complaint to proceed based on allegations of what it "is plausible" a fiduciary could have done without causing more harm than good, rather than requiring allegations that a fiduciary "could not have concluded" otherwise, the decision below removes the fiduciary discretion—i.e., the room for good-faith business judgment—that was central to the holding in *Fifth Third*. Under *Fifth Third*, a fiduciary's judgment receives deference, such that "there is no liability if *any* 'prudent fiduciary ... could ... have concluded that [the proposed alternative action] would do more harm than good,'" App. 12a (Kozinski dissent) (quoting *Fifth Third*, 134 S. Ct. at 2473). The Ninth Circuit's decision flouts that framework, improperly forcing fiduciaries—who often, as noted, must exercise their judgment in the face of incomplete information—to always err on the side of removing the stock fund as an investment option. *See id.* at 16a (under the panel's opinion, "withdrawing the fund will *always* be the better option").

In short, "[t]he panel's reasoning renders th[e] crucial language in *Fifth Third* utterly without meaning." App. 16a (Kozinski dissent).

2. The Ninth Circuit likewise disregarded *Fifth Third*'s direction to consider carefully the interplay between ERISA and the securities laws. *See* 134 S. Ct. at 2473. The court appears to have concluded that because the securities laws require disclosure in certain circumstances, there is no harm in holding that ERISA does too. *See, e.g.*, App. 42a ("Insider fiduciaries with [securities-laws] disclosure obligations should act to protect plan participants under ERISA as soon as the federal securities laws required disclosure."). But the fact that some corporate personnel have disclosure duties under the securities laws does not mean that ERISA fiduciaries, who are balancing a different set of responsibilities, have identical disclosure duties under *that* statute—which "makes no reference to any duty to disclose" the information at issue, *Ehlmann* v. *Kaiser Found. Health Plan of Tex.*, 198 F.3d 552, 555 (5th Cir. 2000). That is true even when the fiduciaries themselves have disclosure duties under the securities laws because of their corporate positions, (i.e., when wearing their "corporate hats"). Those duties cannot just be imported casually into ERISA and imposed on those individuals when wearing their "fiduciary hats."

Holding that certain conduct violates ERISA simply because it violates the securities laws is particularly inappropriate given the restrictions on securities-fraud claims that Congress enacted in order to curb abusive litigation. As this Court has explained, Congress imposed "[e]xacting pleading requirements" on securities-fraud claims as part of the Private Securities Litigation Reform Act of 1996, Pub. L. No. 104-67, 109 Stat. 737. *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S.

308, 313 (2007). Those requirements, however, do not apply to ERISA cases. Hence, for a court to create liability under ERISA for certain conduct simply because liability for that conduct already exists under the securities laws would allow the pleading requirements and other limitations that Congress adopted to be circumvented easily.

3. Had the court of appeals followed *Fifth Third*, it could not have held the operative complaint viable. As explained, the complaint "recites the *conclusion* that fiduciaries could have withdrawn the fund or disclosed inside information." App. 13a (Kozinski dissent). But it never alleges "that defendants could have done so *without doing more harm than good to the fund*," *id.*, let alone satisfies *Fifth Third* by alleging that no prudent fiduciary could have concluded otherwise, *see* 134 S. Ct. at 2473. In fact, it all but alleges the opposite. *See* First Am. Compl. ¶330, *quoted supra* p.6. If even respondents allege that stopping purchases could cause "a drop in the stock price," *id.*—without any concomitant allegation that that harm could be outweighed by any benefit—then surely "a prudent fiduciary in the defendant[s'] position" could have concluded the same, *Fifth Third*, 134 S. Ct. at 2473. Under *Fifth Third*, that is fatal to the complaint, especially since the complaint contains no allegations making it plausible that any drop from a freeze would have been commensurate with the actual alleged overvaluation. App. 15a (Kozinski dissent), *quoted supra* p.14.

C. The Decision Below Will Have Important Unfortunate Consequences

The proper scope of liability for ERISA fiduciaries is a "matter of exceptional importance" because there are "thousands of companies and millions of employees

who participate in stock-ownership plans." App. 18a (Kozinski dissent). And the decision below creates a "litany of practical problems," not only for fiduciaries but also for companies and employees who participate in employee stock retirement plans. *Id.* at 19a. "Every company that offers such a plan," for example, "now faces the chaotic prospect of ... the incessant withdrawal and reinstatement of its fund as fiduciaries are forced to act upon every tidbit of inside information they fear might make them the target of a lawsuit." *Id.* at 18a.

The Ninth Circuit's "quite plausible" (in hindsight) standard will also induce a flood of lawsuits like this one. *See* App. 14a, 18a-19a (Kozinski dissent). That, in turn, will lead to a substantial increase in litigation costs. Prudence claims can be fact-intensive, requiring expensive and burdensome discovery. Hence, when such claims survive a motion to dismiss—significantly more likely under the Ninth Circuit's standard—fiduciaries will be pressured into settling even meritless claims. *See, e.g.*, *Twombly*, 550 U.S. at 559 ("threat of discovery expense will push cost-conscious defendants to settle even anemic cases"). And just the prospect of having to defend against frequent, easy-to-maintain lawsuits will deter companies from offering employer-stock funds in the first place. App. 19a (Kozinski dissent). The "long-term effect," in other words, is that companies will "permanently withdraw company stock as an investment option." *Id.*

That result is bad for companies, bad for employees, and contrary to Congress's intent "to encourage the creation of ESOPs," *Fifth Third*, 134 S. Ct. at 2470. As this Court explained, "ERISA represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of

the creation of such plans." *Id.* (internal quotation marks omitted). Congress thus sought "to create a system that is [not] so complex that administrative costs, *or litigation expenses*, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010) (alterations in original) (emphasis added). To that end, Congress warned against "regulations *and rulings* ... which ... block the establishment and success of these plans." *Fifth Third*, 134 S. Ct. at 2466 (emphasis added). The decision below—now binding precedent in the largest circuit in the country—is just such a ruling: By promoting excessive litigation and thereby discouraging companies from offering ESOP plans, its "promiscuous liability standard flies in the face of Congress's unmistakable will." App. 19a (Kozinski dissent). That result warrants correction by this Court.

II. THE NINTH CIRCUIT ERRED IN EXTENDING *BASIC INC.* V. *LEVINSON* TO ERISA PLAINTIFFS WHO NEITHER BOUGHT NOR SOLD STOCK

To prevail on their duty-of-loyalty claim, respondents would have to prove detrimental reliance. *See, e.g.*, *Bell* v. *Pfizer, Inc.*, 626 F.3d 66, 75 (2d Cir. 2010); *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 579 F.3d 220, 228 (3d Cir. 2009). The district court concluded that respondents did not plead facts sufficient to plausibly allege such reliance, App. 74a, 103a-105a, a conclusion with which the Ninth Circuit did not disagree, *id.* at 46a-47a. Instead, the court of appeals held—sua sponte, without briefing, and with essentially no analysis—that respondents could invoke the presumption of indirect reliance approved for securities-fraud plaintiffs by this Court in *Basic*. *Id.* at 47a. That extension of *Basic* to ERISA plaintiffs who made

no purchase or sale during the class period was unprecedented and wrong. *See In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d 1002, 1046 (S.D. Ohio 2006) ("To date, no appellate courts have declared that the [fraud-on-the-market] theory applies outside the context of securities fraud.").

Basic held that plaintiffs in a securities class action who bought or sold the relevant stock during the class period need not prove "individual[] reliance." 485 U.S. at 242. Instead, "an investor's reliance on any public material misrepresentations ... may be presumed." *Id.* at 247. This presumption rests on the fraud-on-the-market theory, which posits that "in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business.... Misleading statements will therefore defraud *purchasers* of stock even if the purchasers do not directly rely on the misstatements." *Id.* at 241-242 (omission in original) (emphasis added). *Basic* held, that is, that all investors who *trade* a security in a developed market can be presumed to rely on the market price, which in turn is presumed to reflect all available material information and is therefore distorted by material public misstatements. *Id.* at 247.

Basic was decided against the background of *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), in which the Court, per then-Justice Rehnquist, held that "the plaintiff class for purposes of a private damage action under § 10(b) and Rule 10b-5 [i]s limited to actual purchasers and sellers of securities," *id.* at 730; *see also Basic*, 485 U.S. at 247. Indeed, this Court recently reaffirmed that the showings that "a plaintiff *must* make ... to demonstrate that [*Basic*'s] presumption of reliance applies" include "that the plaintiff trad-

ed the stock between the time the misrepresentations were made and when the truth was revealed." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2408 (2014) (emphasis added). Respondents' operative complaint does not, however, allege that any named plaintiff bought or sold Amgen stock during the class period. On the contrary, it states that "during the class period, Plaintiffs *held* Amgen Stock in the Plans." First Am. Compl. ¶22 (emphasis added); *see also id.* ¶¶17-21 (making similar statements about each named plaintiff).

The Ninth Circuit offered no justification for extending *Basic* to an ERISA case involving "holders" rather than purchasers or sellers, stating only that it could "see no reason" not to. App. 47a. But the reasons are obvious: In addition to giving holders a claim under ERISA that *Blue Chip* denied them under the securities laws—and thus effectively *expanding* the *Basic* presumption—the Ninth Circuit conferred a presumption of reliance on persons who have not taken any reliant action at all. Whereas plaintiffs who satisfy *Blue Chip*, in other words, have bought or sold in presumed reliance on the market, with holders there is not necessarily anything for the *Basic* presumption to attach to, no transaction to which reliance (also known as "transaction causation," *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2182 (2011)), could be relevant. By thus allowing plan participants to sue their fiduciaries every time they can allege that there was material misinformation in the market, the Ninth Circuit improperly gave ERISA plaintiffs a right to collect damages when they have no plausible argument that they were personally affected by the alleged misinformation. Put simply, because the operative complaint acknowledges that respondents simply held Amgen stock, respondents have not plausibly alleged that they

relied, individually or as a class—and the Ninth Circuit should not have excused them from doing so.

Even as to plan participants who do trade during a class period, there is reason to doubt that another key assumption in *Basic* holds true in the ESOP context. *Basic* is premised on the notion that individuals rely on market prices to make investment decisions about whether to buy or sell a stock. But research demonstrates that employees investing in stock of their own companies are not relying primarily on price, but rather are influenced by long-range attitudes toward their employer. Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. Rev. 71, 90-92 (2002). Employees tend to over-invest in their employers' stock—even in the face of contrary pricing indications—out of a sense of loyalty and confidence in their companies. *Id.*; *see also* Benartzi et al, *The Law and Economics of Company Stock in 401(k) Plans*, 50 J.L. & Econ. 45, 68 (2007) ("[E]mployees do not correctly understand the economic value of [their] company stock."). Moreover, employers often provide incentives for employees to invest in company stock (such as employer matches), and the tax code does as well, *see* Benartzi et al., *supra*, at 50-51. These incentives further reduce the relevance of price in many employees' retirement-investment decisions. In short, *Basic*'s presumption that individuals rely on market price when making investment decisions is significantly more dubious in the ERISA context.

The Ninth Circuit's extension of *Basic*—like its departure from *Fifth Third*—will likely cause an enormous increase in ERISA class litigation, just as *Basic* caused an enormous increase in securities class litigation, *e.g.*, Mahoney, *Precaution Costs and the Law of Fraud in Impersonal Markets*, 78 Va. L. Rev. 623, 663

(1992). Indeed, because many constraints on securities-fraud complaints do not, as noted, apply to ERISA cases, the increase in such cases could be even greater than what *Basic* caused. Any such increase could dissuade qualified individuals from agreeing to serve as fiduciaries, and, again, deter employers from establishing ESOPs in the first place, in derogation of Congress's efforts "to encourage the creation of ESOPs," *Fifth Third*, 134 S. Ct. at 2470. These developments would compound the effect of the Ninth Circuit's departure from *Fifth Third*, and hurt employees throughout the country.

Finally, allowing the decision below to stand would encourage other courts to follow the Ninth Circuit's example, either by extending *Basic* to ERISA claims or perhaps applying it in still other areas of the law without adequately considering the propriety of such extensions. The Court should summarily reverse to make clear that *Blue Chip* cannot be circumvented and that *Basic* is limited to securities claims.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below summarily reversed. Alternatively, the petition should be granted and the case set for briefing and argument.

Respectfully submitted.

BROOK HOPKINS
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State St.
Boston, MA 02109

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
LOUIS R. COHEN
ALBINAS J. PRIZGINTAS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-56014
D.C. No. 2:07-cv-05442-PSG-PLA

Filed: October 30, 2014
Amended: May 26, 2015

STEVE HARRIS; DENNIS F. RAMOS, AKA DENNIS RAMOS; DONALD HANKS; JORGE TORRES; ALBERT CAPPA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

AMGEN, INC.; AMGEN MANUFACTURING, LIMITED; FRANK J. BIONDI, JR.; JERRY D. CHOATE; FRANK C. HERRINGER; GILBERT S. OMENN; DAVID BALTIMORE; JUDITH C. PELHAM; KEVIN W. SHARER; FREDERICK W. GLUCK; LEONARD D. SCHAEFFER; CHARLES BELL; JACQUELINE ALLRED; AMGEN PLAN FIDUCIARY COMMITTEE; RAUL CERMENO; JACKIE CROUSE; FIDUCIARY COMMITTEE OF THE AMGEN MANUFACTURING LIMITED PLAN; LORI JOHNSTON; MICHAEL KELLY,

Defendants-Appellees.

DENNIS M. FENTON; RICHARD NANULA; THE FIDUCIARY COMMITTEE; AMGEN GLOBAL BENEFITS COMMITTEE; AMGEN FIDUCIARY COMMITTEE,

Defendants.

ORDER AND AMENDED OPINION

On Remand From The United States Supreme Court

Before: Jerome Farris and William A. Fletcher, Circuit Judges, and Edward R. Korman, Senior District Judge.*

Order;
Concurrence to Order by Judge W. Fletcher;
Dissent to Order by Judge Kozinski;
Opinion by Judge W. Fletcher

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* * *

ORDER

The opinion filed on October 30, 2014, and published at 770 F.3d 865, is hereby amended and replaced by the amended opinion filed concurrently with this order. With these amendments, Judge W. Fletcher has voted to deny the petition for rehearing en banc and Judges Farris and Korman so recommend.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**. No further petitions for rehearing or rehearing en banc will be entertained.

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* The Honorable Edward R. Korman, Senior United States District Judge for the Eastern District of New York, sitting by designation.

Judge W. Fletcher's concurrence in the denial of rehearing en banc and Judge Kozinski's dissent from the denial of rehearing en banc are filed concurrently with this order.

W. FLETCHER, Circuit Judge, concurring in the denial of rehearing en banc:[1]

The panel's opinion speaks for itself, and I will not repeat our analysis, much of which is directly responsive to concerns expressed by the Supreme Court in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014).

I write only to correct three ways in which the dissent misrepresents what is in our opinion.

1. Impact of Withdrawal

The dissent characterizes our opinion as holding that withdrawing a fund as an investment option is appropriate because, "as a *general* matter, 'when the previously concealed material information about [a] company is eventually revealed ... the stock price will inevitably decline, almost certainly by more than the amount it would have declined as a result of merely withdrawing the [f]und as an investment option.'" Dissent at 20 (emphasis in original) (quoting Opinion at 46). Based on that characterization, the dissent claims that we ignore the Court's instruction in *Fifth Third* to consider whether there will be a net harm to plan participants resulting from withdrawal of a fund. The dissent contends that our reasoning is circular because, under

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[1] Senior Circuit Judge Farris and Senior District Judge Korman were not eligible to vote on whether the appeal in this case should have been reheard en banc, and therefore cannot concur in the denial of rehearing en banc. However, Judge Farris and Judge Korman both agree with what is written here.

the reasoning it ascribes to us, "withdrawing the fund will *always* be the better option, because any stock price decline it may precipitate will be deemed 'inevitable.'" Dissent at 20. (emphasis in original).

Our opinion contains no such general, all-purpose holding. We addressed only the situation where "the previously concealed material information about the company is eventually revealed *as required by the securities laws*." Opinion at 46 (emphasis added). As we wrote in the opinion:

> In a separate class action simultaneously pending before the same district judge, investors in Amgen common stock claimed violations of federal securities laws based on the same alleged facts as in the ERISA action now before us. In a careful thirty-five page order, the district court concluded that the investors had sufficiently alleged material misrepresentations and omissions, scienter, reliance, and resulting economic loss to state claims under Sections 10(b) and 20(a) of the 1934 Exchange Act. *See* 15 U.S.C. §§ 78j(b), 78t(a). The district court certified a class based on the facts alleged in the complaint. We affirmed the district court's class certification in *Conn. Ret. Plans & Trust Funds v. Amgen, Inc.*, 660 F.3d 1170 (9th Cir. 2011). The Supreme Court affirmed in *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

Opinion at 37. We therefore assumed, under Federal Rule of Civil Procedure 8(a) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), that there was material information that had been withheld in violation of the securities laws. Our analysis is based on that assumption.

Withdrawal of the fund as an investment option might indeed "do more harm than good to the fund," *Fifth Third*, 134 S. Ct. at 2473, where the securities laws do not independently require disclosure. But where the securities laws do require disclosure of previously withheld material information, as in this case, the impact of the eventual disclosure of that information must be taken into account in assessing the net harm that will result from the withdrawal of the fund. In such a case, as we wrote in our opinion, it is plausible to conclude that the withdrawal of the fund will result in a net benefit, rather than a net harm, to plan participants.

2. Knowledge of Fiduciaries

The dissent contends that we impose on fiduciaries an obligation to act when they "only ... suspect" there has been a violation of the federal securities laws, and that under our opinion a fiduciary would have an obligation to act whenever there is "any *arguable* violation" of those laws. Dissent at 21 (emphasis in original). That is not what we wrote. Our opinion nowhere requires a fiduciary to act based on mere suspicion or arguable violation of the federal securities laws. Under well-established circuit precedent, "[a] violation [of ERISA's prudent person standard] may occur where a company's stock ... was artificially inflated during that time by an illegal scheme about which the fiduciaries *knew or should have known*, and then suddenly declined when the scheme was exposed." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1102 (9th Cir. 2008) (emphasis added); *see also* 29 U.S.C. § 1105(a)(3) (imposing liability on a plan fiduciary for another fiduciary's breach of fiduciary responsibility "if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach"). We wrote repeatedly and consistently

that a fiduciary's obligation to act is triggered only when he or she "knew or should have known" of a violation of the securities laws.

For example, we wrote that the fiduciaries in this case were obliged to act only when they *"knew or should have known* that material information was being withheld from the public." Opinion at 46 (emphasis added). We concluded that the plaintiffs in this case had shown that it was "plausible," under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), that at least some fiduciaries *"knew or should have known* that the Amgen Common Stock Fund was purchasing stock at an artificially inflated price due to material misrepresentations and omissions by company officers." Opinion at 44 (emphasis added). And we held that, on remand, the defendants were entitled to argue "that their liability, or the extent of their liability, should depend upon the extent to which they *knew, or should have known*, that material information was being withheld from the public in violation of the federal securities laws." Opinion at 49 (emphasis added). *See also id.* at 39, 41, 54, 55, 56.

3. Disclosure Obligations Under ERISA

Finally, the dissent contends that our opinion imposes on ERISA fiduciaries greater disclosure obligations than those imposed under the federal securities laws. It writes:

> The panel also disregards the Court's second key instruction, that we carefully consider how ERISA-based obligations may conflict with disclosure requirements under the securities laws. The panel reasons that such a conflict simply can't occur because "if defendants had revealed material information in a timely fashion to the general public ... they would

> have simultaneously satisfied their duties under both the securities laws and ERISA." But the panel fails to appreciate the Court's concerns in *Fifth Third*. The Court was not only concerned that fiduciaries would be forced to violate the securities laws to comply with ERISA, it was also worried that "ERISA-based obligations" would be broader than the disclosure requirements under the securities law and would therefore interfere with the compromise Congress struck when enacting those laws.
>
> The securities laws do not require continuous disclosure of all information that may bear on a stock price. Congress ... enacted a comprehensive and tessellated statutory scheme for corporate disclosure that imposes obligations on *certain* corporate officers to reveal information at *specific* times. *See, e.g.*, 15 U.S.C. §§ 78m, 78*o*(d). There is no allegation that 17 of the 19 defendants here violated the securities laws, or that they even had disclosure obligations under those laws. Yet under the panel's holding, they are liable under ERISA for failing to do precisely what the securities law do *not* require of them: immediately disclose inside information at the moment they "should have known" it was material.

Dissent at 22-23 (emphases in original).

The dissent is mistaken. We nowhere wrote that ERISA fiduciaries, including defendants in this case, have broader disclosure obligations than those imposed under the federal securities law. In response to *Fifth Third* (and to arguments made by defendants before

Fifth Third was decided), we carefully considered whether "ERISA-based obligations may conflict with disclosure obligations under the securities laws." We also carefully restricted our description of defendants' disclosure duties under ERISA to those disclosure obligations that complied with, but did not exceed, obligations under the securities laws. We agree with the dissent that "the securities laws do not require continuous disclosure of all information that may bear on a stock price," and we nowhere wrote that ERISA requires any such "continuous disclosure."

We wrote:

> Compliance with ERISA would not have required defendants to violate [federal securities] laws; indeed, we interpret ERISA to require first and foremost that defendants *not* violate those laws. That is, if defendants had revealed material information in a timely fashion to the general public (including plan participants), thereby allowing informed plan participants to decide whether to invest in the Amgen Common Stock Fund, they would have simultaneously satisfied their duties under both the securities laws and ERISA. ... Alternatively, if defendants had made no disclosures but had simply not allowed additional investments in the Fund with the price of Amgen stock was artificially inflated, they would not thereby have violated the prohibition against insider trading, for there is no violation absent purchase or sale of stock.

Opinion at 48-49 (emphasis in original).

In response to defendants' argument that they "owe no duty under ERISA to provide material infor-

mation about Amgen stock to plan participants who must decide whether to invest in such stock," we wrote that defendants' "fiduciary duties of loyalty and care to plan participants under ERISA, with respect to company stock, are [not] *less* than the duty they owe to the general public under the securities laws." *Id.* at 51 (emphasis added). But we never wrote, or even suggested, that defendants owe a *greater* disclosure duty than that imposed under the securities laws. We summarized, "[T]here is no contradiction between defendants' duty under the federal securities laws and ERISA. Indeed, properly understood, these laws are complementary and reinforcing." *Id.*

Judge KOZINSKI, with whom Judges O'SCANNLAIN, CALLAHAN and BEA join, dissenting from the denial of rehearing en banc:

The Supreme Court has previously admonished us for ignoring a grant, vacate and remand (GVR) order and "reinstating [our] judgment without seriously confronting the significance of the cases called to [our] attention." *Cavazos v. Smith*, 132 S. Ct. 2, 7 (2011). We're at it again. In *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), the Supreme Court created stringent new requirements for plaintiffs who sue fiduciaries under ERISA for imprudent investment in an employer's stock. Here, in response to a GVR, the panel not only fails to give effect to those requirements, but also insulates our circuit law from important aspects of the Supreme Court's holding.

The panel's decision creates almost unbounded liability for ERISA fiduciaries, plainly at odds with what the Court instructed. Worse still, the panel's rule will have grave consequences for corporations across America, leaving them acutely vulnerable to meritless law-

suits and subjecting them to novel, judicially-fashioned disclosure requirements that conflict with those of the securities laws. I sincerely regret that a majority of our court did not see fit to take this case en banc. I expect the Supreme Court will promptly correct our error.

1. Congress has long viewed employee ownership of employer stock as "a goal in and of itself." *Moench v. Robertson*, 62 F.3d 553, 568 (3d Cir. 1995). To further this goal, Congress has given companies numerous incentives to create retirement plans that permit investment in their own stock. Under such plans, employees choose the proportion of their retirement savings to be placed in a "fund" consisting *entirely* of company stock, and the proportion to be placed into other funds that contain a more diversified portfolio. Corporate officers typically administer these plans and serve as fiduciaries with certain obligations under ERISA. However, plan fiduciaries typically don't have discretion to decide how an employee's savings are to be apportioned between the funds in a plan. So, for example, when an employee says he wants 25% of his monthly retirement savings placed in the employer-stock fund, 25% of those savings are invested in employer stock. The fiduciary is effectively an intermediary: He must take the savings the employee apportions to the employer fund and buy the company's stock with it.

So far, so good. The trouble occurs when a fiduciary has reason to believe that employer stock might be overvalued. Though a fiduciary can't elect to diversify employee savings of his own accord, he *can* remove company stock as an investment option by withdrawing the fund, thereby preventing employees from continuing to invest in what he suspects might be overpriced shares. But removing company stock as an investment option is a radical step. It may violate the terms of a

plan's written instruments, it can send a signal to the market that something is seriously wrong with the company and it certainly undermines employees' investment autonomy. Therefore, whenever a fiduciary fears an employer's stock is overvalued, he is, in the Supreme Court's words, "between a rock and a hard place: If he keeps investing and the stock goes down he may be sued for acting imprudently ... but if he stops investing and the stock goes up he may be sued for disobeying the plan documents" or otherwise harming the fund. *Fifth Third*, 134 S. Ct. at 2470.

Recognizing the uniquely vulnerable position of ERISA fiduciaries, many courts, including ours, had previously held that a fiduciary's investment in employer stock should be given a "presumption of prudence." *See, e.g., Quan v. Computer Scis. Corp.*, 623 F.3d 870, 881 (9th Cir. 2010). Under this presumption, a fiduciary was liable only if he continued to invest in employer stock when the company was facing collapse or catastrophic decline. In *Fifth Third*, the Supreme Court considered whether fiduciaries are owed such a presumption. The plaintiffs there argued that, far from being presumed prudent, fiduciaries should be liable whenever they possessed inside information suggesting company stock was overvalued, and failed to either publicly disclose that information or remove the stock as an investment option. *Id.* at 2464.

The Court's decision in *Fifth Third* was a compromise. While the Court rejected the presumption of prudence as inconsistent with ERISA's text, it recognized that, without such a presumption, fiduciaries were at acute risk of liability. The Court therefore stressed the special importance of the motion to dismiss to "weed out meritless lawsuits." *Id.* at 2470. To facilitate a rigorous 12(b)(6) inquiry, the Court crafted new

and daunting liability requirements that plaintiffs must plausibly allege are met in order to state a claim. Two of them are relevant to this case. First, the Court held that there is no liability if *any* "prudent fiduciary in the defendant's position could [] have concluded that stopping purchases ... or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." *Id.* at 2473. Second, the Court stated that lower courts should carefully "consider the extent to which an ERISA-based obligation either to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws." *Id.*

2. Plaintiffs' underlying legal theory in this case is functionally identical to that in *Fifth Third*. Plaintiffs allege that Amgen, a large pharmaceutical company, concealed the negative results of a clinical trial for an anemia drug and also marketed a risky off-label use for that drug. After the results of the trial came to light and the off-label use of the drug was restricted by the FDA, Amgen's stock dropped by approximately 30%. Plaintiffs claim that fiduciaries of Amgen's stock-ownership plans knew or should have known that the stock was overvalued based on inside information, and should have either removed the Amgen stock as an investment option or revealed to the general public the test results and the alleged riskiness of the off-label use.

The panel initially decided this case before *Fifth Third* and reversed the district court's dismissal. *Harris v. Amgen, Inc.*, 738 F.3d 1026 (9th Cir. 2013). Amgen supplemented its petition for certiorari after

Fifth Third was decided, specifically pointing out the panel's inconsistency with the two requirements discussed above. The Court vacated the panel's decision and remanded for reconsideration in light of *Fifth Third*, obviously expecting the panel would impose the two new liability requirements relevant to this case.

Unsurprisingly, given that it was filed before *Fifth Third* was decided, the existing complaint fails to adequately plead those two requirements. A complaint may survive a motion to dismiss only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). The Supreme Court held in *Fifth Third* that a defendant is only "liable for the misconduct alleged" if no reasonable fiduciary in his position could conclude that withdrawing the fund or disclosing inside information would do more harm than good to the fund. When, as here, the Supreme Court changes—or more precisely defines—what constitutes "misconduct," it inescapably follows that the "factual content" that must be pled also changes. Yet, the panel holds the complaint here survives simply because it recites the *conclusion* that fiduciaries could have withdrawn the fund or disclosed inside information. Nowhere does the complaint even allege that defendants could have done so *without doing more harm than good to the fund*, let alone plead sufficient facts to make such an allegation plausible. Nor do plaintiffs allege that defendants could have disclosed inside information without conflicting with the securities laws—*Fifth Third's* other novel liability requirement.

Sure, the complaint is long and contains plenty of background information regarding the alleged inflation

of Amgen stock. But a complaint's sufficiency no longer depends merely on its length or level of detail. In the *Twiqbal* era, plaintiffs must state facts that "plausibly suggest an entitlement to relief." *Iqbal*, 556 U.S. at 681. A complaint that fails to state sufficient facts to plausibly suggest how *Fifth Third*'s new requirements have been met must be dismissed, no matter how extensive its other allegations may be.

After all, how can meritless ERISA fiduciary suits be "weeded out" at the motion to dismiss stage, if a complaint can survive through no more than an unadorned conclusion that fiduciaries could have withdrawn the fund or disclosed information? *Any* complaint filed by minimally competent counsel will surely do that. By "unlock[ing] the doors of discovery for [those] armed with nothing more than conclusions," *Iqbal*, 556 U.S. at 678-79, the panel's holding not only conflicts with *Fifth Third*'s special emphasis on Rule 12(b)(6), it fundamentally undermines *Iqbal* and *Twombly* in our circuit. Future litigants in our court will now be able to inflict massive discovery costs on defendants by reciting liability requirements, without furnishing any of the facts necessary for us to plausibly infer that those requirements have been met.

3. It's not just the panel's failure to remand that's suspect, it's the reasoning it employs to get there. Quite aside from its ramifications for pleading standards, the panel's reasoning renders meaningless crucial language in *Fifth Third*, in open disregard for the intent behind the Supreme Court's GVR order.

Let's start with the Court's requirement that liability will attach only if no "prudent fiduciary" could "conclude[] that stopping purchases ... or publicly disclosing negative information would do more harm than good to

the fund." The panel first asserts that, "given the relatively small number of Amgen shares that would not be purchased by the Fund in comparison to the enormous number of actively traded shares, it is unlikely that the decrease in the number of shares that would otherwise have been purchased, considered alone, would have an appreciable negative impact on the share price." How does the panel know that, you ask? I'm not sure—it's not an allegation that was pled in the complaint. So, the panel's view can only be based on some extra-record speculation, the sort of thing we are neither permitted nor equipped to engage in.

What the complaint does allege is that, "If Company Stock were eliminated as an investment option under the Plan, [it] would have sent a negative signal to Wall Street analysts, which in turn would result in reduced demand for Amgen Stock and a drop in the stock price." First Amended Complaint ¶ 330. As the complaint appears to acknowledge, withdrawal of the fund as an investment option is the worst type of disclosure: It signals that something may be deeply wrong inside a company but doesn't provide the market with information to gauge the stock's true value. Of course, there may be exceptional circumstances where such extreme action is compelled by ERISA, and *Fifth Third* calls for a careful parsing of the particular allegations in a complaint to decide when that is so. But, instead of engaging in that fact-sensitive inquiry, the panel holds that withdrawing the fund was appropriate because, as a *general* matter, "when the previously concealed material information about [a] company is eventually revealed ... the stock price will inevitably decline, almost certainly by more than the amount it would have declined as a result of merely withdrawing the [f]und as an investment option."

Under that theory, withdrawing the fund will *always* be the better option, because any stock price decline it may precipitate will be deemed "inevitable." But, for *Fifth Third*'s requirement to mean anything at all, the Supreme Court must have contemplated situations where a fiduciary could permissibly balance the long and short run effects of withdrawal on the share price, or account for the fact that a badly timed withdrawal could cause the stock value to drop below its efficient-market level. The panel's holding washes those possibilities away. It blesses a complaint that does nothing more than allege the hypothetical capability of withdrawing the fund, without requiring a single allegation regarding the probable effects of that withdrawal. In our circuit, a fiduciary now can *never* be safe from a lawsuit if he fails to withdraw the fund based on the reasonable belief that it will "do more harm than good to the fund by causing a drop in the stock price." *Fifth Third*, 134 S. Ct. at 2473. The panel's reasoning renders that crucial language in *Fifth Third* utterly without meaning.

That holding implicates a far broader range of situations than just those in which an actual securities violation has occurred. Remember, at the time of acting, a fiduciary won't know whether there was a securities violation; he'll only have reason to suspect there was one. Under conditions of uncertainty, the only way a fiduciary can avoid the risk of liability is by disclosing any *arguable* violation. For example, a fiduciary might believe that a company's financial performance is being overstated by senior officials. Or he might believe that a piece of information needs to be disclosed immediately under the securities laws, when senior officials think only periodic disclosure is required. Such differences of opinion are a common occurrence in most corporations.

A fiduciary—often a mid-level administrator with no independent legal counsel and limited information about the company's overall situation—may well be egregiously wrong in his assessment. Yet, under the panel's holding, he risks liability every time he fails to act on his impulses, even when any proposed course of action would have disastrous consequences for the share price. And, don't forget, such share-price drops—when they inevitably result—will punish all those employees who had previously chosen to invest in the company.

The panel also disregards the Court's second key instruction, that we carefully consider how ERISA-based obligations may conflict with disclosure requirements under the securities laws. The panel reasons that such a conflict simply can't occur because "if defendants had revealed material information in a timely fashion to the general public ... they would have simultaneously satisfied their duties under both the securities laws and ERISA." But the panel fails to appreciate the Court's concerns in *Fifth Third*. The Court was not only concerned that fiduciaries would be forced to violate the securities laws to comply with ERISA, it was also worried that "ERISA-based obligations" would be *broader* than the disclosure requirements under the securities laws and would therefore interfere with the compromise Congress struck when enacting those laws. *Fifth Third*, 134 S. Ct. at 2473.

The securities laws do not require continuous disclosure of all information that may bear on a stock price. Congress specifically rejected that route because of the enormous transaction costs and inefficiencies such disclosures would create. Instead, it enacted a comprehensive and tessellated statutory scheme for corporate disclosure that imposes obligations on *certain*

corporate officers to reveal information at *specific* times. *See, e.g.*, 15 U.S.C. §§ 78m, 78o(d). There is no allegation that 17 of the 19 defendants here violated the securities laws, or that they even had disclosure obligations under those laws. Yet, under the panel's holding, they are liable under ERISA for failing to do precisely what the securities laws do *not* require of them: immediately disclose inside information at the moment they "should have known" it was material. The panel has a duty, following *Fifth Third*, to assess whether compelling such disclosures might conflict with the securities laws. Instead, the panel acts as if the Supreme Court hadn't spoken.

4. It makes matters worse that the panel's adventurism occurs in a matter of exceptional importance that drastically impacts thousands of companies and millions of employees who participate in stock-ownership plans. Every company that offers such a plan now faces the chaotic prospect of its plan fiduciaries releasing a disparate array of half-truths and incomplete data to the market; or worse, the incessant withdrawal and reinstatement of its fund as fiduciaries are forced to act upon every tidbit of inside information they fear might make them the target of a lawsuit. What conceivable benefit flows from having a company's "VP of human resources" publicly explain that he disagrees with a CEO's financial projection? What virtue is there in triggering a stock price collapse by withdrawing the fund, simply because the "director of benefits" is worried that an erroneous statement was made? I understand the impulse to deter securities fraud. But it's hardly rational to require every blind man to report on the shape of the whole elephant.

Let's also not forget that many ERISA fiduciary suits are as bad for employees as they are for compa-

nies. Settling meritless lawsuits is a costly endeavor and the money will no doubt come out of workers' pockets sooner or later, whether that be through diminished salaries, layoffs or reductions in employer benefit contributions.

And a proliferation of ERISA fiduciary suits will surely have the long-term effect of forcing companies to permanently withdraw company stock as an investment option, even though the presence of such an option has been shown to enhance employee satisfaction, reduce the propensity for layoffs and increase an employer's likelihood to directly contribute to its employees' retirement benefits. Even if none of that were so, Congress has made the considered policy judgment to encourage the creation of employee stock-ownership plans and has specifically instructed courts to refrain from "regulations and rulings [that] block the establishment and success of [such] plans." *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1590 (1976). Leaving aside the litany of practical problems the panel opinion creates, its promiscuous liability standard flies in the face of Congress's unmistakable will.

* * *

As an intermediate court, our role is to faithfully apply the law as announced by the Supreme Court. The Court in *Fifth Third* plainly intended to offer fiduciaries robust protection against litigation at the motion to dismiss stage. The Court devoted multiple pages of its opinion to liability requirements that are genuinely novel. The Court then granted a petition for certiorari that specifically directed us to re-examine our prior holding in light of those new liability requirements. Eschewing the simple and expedient solution of a re-

mand, the panel substituted its own judgment for that of the Supreme Court. That decision evinces an impermissible disregard for controlling authority and will have dire consequences for corporations and employees alike. It's a decision we will come to regret.

OPINION

W. FLETCHER, Circuit Judge:

Plaintiffs, current and former employees of Amgen, Inc. ("Amgen") and its subsidiary Amgen Manufacturing, Limited ("AML"), participated in two employer-sponsored pension plans, the Amgen Retirement and Savings Plan (the "Amgen Plan") and the Retirement and Savings Plan for Amgen Manufacturing, Limited (the "AML Plan") (collectively, "the Plans"). The Plans were employee stock-ownership plans that qualified as "eligible individual account plans" ("EIAPs") under 29 U.S.C. § 1107(d)(3)(A). All of the plaintiffs' EIAPs included holdings in the Amgen Common Stock Fund, one of the investments available to plan participants. The Amgen Common Stock Fund held only Amgen common stock.

After the value of Amgen common stock fell, plaintiffs filed a class action under the Employee Retirement Income Security Act ("ERISA") against Amgen, AML, Amgen's board of directors, and the Fiduciary Committees of the Plans (collectively, "defendants"), alleging that defendants breached their fiduciary duties under ERISA. The district court dismissed the complaint against Amgen under Federal Rule of Civil Procedure 12(b)(6) on the ground that Amgen was not a fiduciary. It dismissed the complaint against the other defendants, who were fiduciaries, after applying the "presumption of prudence" articulated in *Quan v. Computer Sciences*

Corp., 623 F.3d 870 (9th Cir. 2010). Alternatively, even assuming the absence of the presumption, the district court dismissed the complaint on the ground that defendants had not violated their fiduciary duties.

In an earlier opinion, we reversed the district court's dismissal of the complaint. *Harris v. Amgen, Inc.*, 738 F.3d 1026 (9th Cir. 2013). Applying *Quan*, we held that the presumption of prudence did not apply. We held, further, that, in the absence of the presumption, plaintiffs had sufficiently alleged violation of the defendants' fiduciary duties. Finally, we held that Amgen was an adequately alleged fiduciary of the Amgen Plan.

Defendants petitioned for a writ of certiorari. The Supreme Court deferred ruling on the petition while it considered *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), another ERISA case in which the presumption of prudence was at issue. In *Quan*, we had held that the presumption of prudence was available to ERISA fiduciaries for both EIAPs and employee stock ownership plans ("ESOPs") "when the plan terms require or encourage the fiduciary to invest primarily in employer stock." *Quan*, 623 F.3d at 881. Overruling *Quan* and similar decisions by our sister circuits, the Supreme Court held in *Fifth Third* that there was no presumption of prudence for ESOP fiduciaries beyond the statutory exemption from the otherwise applicable duty to diversify. *Fifth Third*, 134 S. Ct. at 2467; 29 U.S.C. § 1104(a)(2). After deciding *Fifth Third*, the Court granted certiorari, and vacated and remanded for reconsideration in light of its decision. *Amgen, Inc. v. Harris*, 134 S. Ct. 2870 (2014).

On reconsideration in light of *Fifth Third*, we again reverse the district court's dismissal.

I. Background

The following narrative is taken from the complaint and documents that provide uncontested facts. On a motion to dismiss, we assume the allegations of the complaint to be true. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

Amgen is a global biotechnology company that develops and markets pharmaceutical drugs. AML, a wholly owned subsidiary of Amgen, operates a manufacturing facility in Puerto Rico. To provide retirement benefits to their employees, Amgen set up the Amgen Plan on April 1, 1985. AML set up the AML Plan in 2002 and it became effective on January 1, 2006.

The Plans are covered by the Employee Retirement Income Security Act ("ERISA"). Both qualify as "individual account plans." *See* 29 U.S.C. § 1002(34). Plan participants contribute a portion of their pre-tax compensation to individual investment accounts. They receive benefits based solely upon their contributions, adjusted for any gains and losses in assets held by the Plans. Participants may contribute up to thirty percent of their pre-tax compensation. They may select from a number of investment funds offered by the Plans. One of those is the Amgen Common Stock Fund, which holds only Amgen stock. Amgen stock constituted the largest single asset of both Plans in 2004 and 2005.

This litigation arises out of a controversy concerning Amgen drugs used for the treatment of anemia. Anemia is a condition in which blood is deficient in red blood cells or hemoglobin. Causes of anemia include an iron-deficient diet, excessive bleeding, certain cancers and cancer treatments, and kidney or liver failure. In the early 1980s, Amgen scientists discovered how to make artificial erythropoietin, a protein formed in the

kidneys that stimulates erythropoiesis, the formation of red blood cells. After this discovery, Amgen commercialized the manufacture of a class of drugs known as erythropoiesis-stimulating agents ("ESAs") to treat anemia.

In 1989, the Federal Drug Administration ("FDA") approved Amgen's first commercial ESA, epoetin alfa, for the treatment of anemia associated with chronic kidney failure. Amgen marketed epoetin alfa for approved uses under the brand name EPOGEN ("Epogen"), and licensed patents to Johnson & Johnson ("J&J") to develop additional marketable uses. J&J obtained FDA approval between 1991 and 1996 to market epoetin alfa under the brand name PROCRIT ("Procrit") for anemia associated with chemotherapy and HIV therapies, for chronic kidney diseases, and for presurgery support of anemic patients. J&J had exclusive marketing rights for Procrit under its licensing agreement with Amgen.

Sometime before 2001, Amgen developed a new ESA, darbepoetin alfa, whose sales by Amgen were not restricted by J&J's exclusive marketing rights for Procrit. Darbepoetin alfa, marketed as Aranesp, lasts longer in the bloodstream than epoetin alfa. The FDA approved Aranesp for treatment of anemia associated with chronic kidney failure and cancer chemotherapy. Aranesp has taken significant market share from J&J's Procrit. At the time the complaint was filed, Aranesp "control[led] half the market" for non-dialysis ESA. Sales of EPOGEN and Aranesp have been "core to [Amgen's] survival and success," making up roughly half of Amgen's $14.3 billion in revenue in 2006.

In the late 1990s and early 2000s, several clinical trials raised safety concerns regarding the use of ESAs

for particular anemic populations. In 1998, the Normal Hematocrit Study tested the efficacy of ESAs on anemia patients with pre-existing heart disease. The study was terminated because the test group experienced statistically significant higher rates of blood clotting. In 2003 and early 2004, two trials—ENHANCE and BEST—tested ESAs on cancer patients in Europe. The ENHANCE trial showed shorter progression-free survival and shorter overall survival of head and neck cancer patients for the ESA group than the placebo group. The BEST trial was terminated after four months because breast cancer patients in the group taking epoetin alfa had a higher rate of death than those in the placebo group.

ENHANCE and BEST did not test the safety of ESAs for the specific uses and doses for which they had been approved in the United States. In March 2004, the FDA published notice in the Federal Register that the Oncology Drug Advisory Committee ("ODAC"), an FDA-sponsored group of oncology experts, would convene in May 2004 to discuss safety concerns about Aranesp. In April, before the ODAC meeting, an Amgen spokesperson stated during a conference call with investors, analysts, and plan participants that "the focus [of the ODAC meeting] was not on Aranesp" and that "the safety for Aranesp has been comparable to placebo."

During its two-day meeting with ODAC, the FDA urged Amgen to conduct further clinical trials to test the safety of ESAs for uses that had already been approved by the FDA. Amgen made a presentation at the meeting outlining what it called the "Amgen Pharmacovigilance Program," consisting of five ongoing or planned clinical trials testing Aranesp "in different tumor treatment settings." Amgen's Vice President for

Oncology Clinical Development described the Amgen program as the "responsible and credible approach to definitively resolv[e] the questions raise[d]" by the FDA.

One of the trials under Amgen's program was the Danish Head and Neck Cancer Group ("DAHANCA") 10 Trial. The DAHANCA 10 Trial tested whether high doses of Aranesp could help shrink tumors in patients receiving radiation therapy for head and neck cancer. On October 18, 2006, DAHANCA investigators temporarily halted the study "due to information about potential unexpected negative effects." Amgen was informed of the temporary halt of the study on or near that day. Amgen did not disclose that the DAHANCA 10 Trial had been temporarily halted.

An analysis of the halted DAHANCA 10 Trial was completed on November 28, 2006. The principal investigator reported that "[b]ased on these outcome results the DAHANCA group concluded that the likelihood of a reverse outcome, i.e. that Aranesp would be significantly better than in control[,] was almost nonexisting." The DAHANCA 10 Trial was permanently terminated on December 1, 2006. DAHANCA investigators concluded that "there is a small but significant poor outcome in the patients treated with Aranesp" in that tumor growth was worse for patients who took Aranesp compared to patients who did not. Amgen was informed in December 2006 that the study had been permanently terminated.

Another clinical trial, CHOIR, raised additional safety concerns about ESAs. The CHOIR trial investigated the safety of epoetin alfa (EPOGEN) when used to treat chronic kidney disease patients. The safety monitoring board for CHOIR terminated the trial when

a higher incidence of death and cardiovascular hospitalization was observed among epoetin alfa users. Yet another clinical trial, CREATE, tested the benefit provided by Roche Pharmaceuticals's ESA in raising hemoglobin levels in patients with chronic kidney disease. On November 16, 2006, Roche announced that the results of the CREATE trial "clearly show that there is no additional cardiovascular benefit from treating to higher hemoglobin levels in this patient group."

On November 20, Amgen posted a public statement responding to the CHOIR and CREATE trials. Amgen wrote, "A very substantial body of evidence, developed over the past 17 years, demonstrates that anemia associated with chronic kidney disease can be treated safely and effectively with EPOGEN and Aranesp when administered according to the Food and Drug Administration (FDA)-approved dosing guidelines." Two weeks later, Amgen issued a press release to correct "what the company believes are misleading and inaccurate news reports regarding the use of its drugs." Amgen reiterated, "EPOGEN and Aranesp are effective and safe medicines when administered according to the Food and Drug Administration (FDA) label."

Amgen also conducted its own clinical trial, the "103 Study." The 103 Study tested Aranesp in 939 patients with anemia secondary to cancer. The FDA later described the 103 Study as "demonstrat[ing] significantly shorter survival rate[s] in cancer patients receiving ESAs as compared to th[o]se receiving transfusion support." However, during a January 2007 conference call, an Amgen representative described the 103 Study as not demonstrating a "statistically significant adverse [e]ffect of Aranesp on overall mortality in this patient population." He said that "the risk benefit ratio for Aranesp in these extremely ill patients with anemia

secondary to malignancy is, at best, neutral and perhaps negative." During what may have been the same conference call, discussing Amgen's fourth-quarter earnings on January 25, an Amgen representative stated, in response to concerns expressed about the 103 Study, that "we have a well established risk benefit profile."

During a February 16, 2007, investor conference call, defendant Kevin Sharer, Amgen's President, Chief Executive Officer, and Chairman of the Board, stated, "We strongly believe, as we have consistently stated, that Aranesp and EPOGEN are safe and effective medicines when used in accordance with label indications." During a March conference call, defendant Sharer reiterated, "When we look at the totality of data, we believe our products are safe and effective when used on-label." On March 9, 2007, Amgen posted a statement on the company website available to plan participants under the title "Amgen's Statement on the Safety of Aranesp (darbepoetin alfa) and EPOGEN (Epoetin alfa)":

> Aranesp (darbepoetin alfa) and EPOGEN (Epoetin alfa) have favorable risk/benefit profiles in approximately four million patients with chemotherapy-induced anemia or CKD when administered according to the FDA-approved dosing guidelines.

Amgen engaged in extensive marketing, encouraging both on- and off-label uses of its ESAs. Amgen trained its sales representatives to ask questions that steered doctors to discussions about off-label uses. In an Amgen sales personnel manual, Amgen gave an "expanded list" of "excellent questions" to ask doctors in order to move the discussions toward off-label uses. Examples include, "What is keeping you from using

Aranesp in all your MDS/HIV/CIA patients?" MDS is myelodysplastic syndrome, an illness often resulting in anemia. The FDA has never approved Aranesp to treat MDS or HIV patients.

Amgen created a speakers program in which Amgen paid for dinners at which "expert" speakers talked to physicians and other providers about off-label uses for Aranesp. Speakers program events were not accredited as continuing medical education seminars conducted by an independent medical association. Amgen paid not only the speakers but also the doctors and other medical providers who attended the events. The $1,000 payments to physician attendees were "paid from [Amgen's] marketing budget."

Amgen educated medical providers about the profit they could obtain by prescribing its ESAs. Before January 1, 2005, Medicare calculated drug reimbursement rates based on the average wholesale price ("AWP") of drugs. Medical providers could purchase Amgen's ESAs at a price lower than the AWP, but could charge Medicare the AWP. Amgen created spreadsheets and other tools to help providers calculate the profit. Amgen also encouraged doctors to use its ESAs inefficiently. For example, it encouraged doctors to deliver Epogen intravenously rather than subcutaneously, because an intravenous delivery of the drug requires a substantially larger dose to achieve the same effect.

Amgen marketing efforts were successful. For example, Amgen's worldwide sales of Aranesp increased fourteen percent during the first quarter of 2007 compared to the same quarter in 2006. Amgen told investors on several occasions that its marketing practices were proper. In public SEC filings, Amgen stated that it marketed its products only for on-label uses. In December

2006, in response to negative publicity about off-label uses, Amgen issued a press release "intended to clarify Amgen's position on the use of EPOGEN and Aranesp and to correct what the company believes are misleading and inaccurate news reports regarding the use of its drugs." The company clarified that "Amgen only promotes the use of EPOGEN and Aranesp consistent with the FDA label." On a January 2007 conference call, Amgen stated that "our promotion [of EPOGEN] has always been strictly according to our label, we do not anticipate a major shift in clinical practice."

In February 2007, *The Cancer Letter* published an article entitled "Amgen Didn't Tell Wall Street About Results of [DAHANCA] Study." The article reported that the DAHANCA trial had been temporarily halted due to the "significantly inferior therapeutic outcome from adding Aranesp to radiation treatment of patients with head and neck cancer." On February 23, the Associated Press announced that the USP DI, an influential drug reference guide, had delisted Aranesp as a treatment for anemia in cancer patients not undergoing chemotherapy. On February 27, the *New York Times* published an article stating:

> New studies are raising questions about whether drugs that have been used by millions of cancer patients might actually be harming them. The drugs, sold by Amgen, Roche, and Johnson & Johnson, are used to treat anemia caused by chemotherapy and meant to reduce the need for blood transfusions and give patients more energy. But the new results suggest that the drugs may make the cancer itself worse. ... [S]ome cancer specialists and securities analysts say the new information may make doctors more cautious in using the drugs,

> which have combined sales for the three companies exceeding $11 billion and have been heavily promoted through efforts that include television commercials.

On March 9, the FDA mandated a "black box" warning for off-label use of Aranesp and Epogen. A black box warning is the strongest warning the FDA can require. *Cf.* 21 C.F.R. § 201.57(c)(1) (2012). The black box warning read:

> Recently completed studies describe an increased risk of death, blood clots, strokes, and heart attacks in patients with kidney failure where ESAs were given at higher than recommended doses. In other studies, more rapid tumor growth occurred in patients with head and neck cancer who received these higher doses. In studies where ESAs were given at recommended doses, an increased risk of death was reported in patients with cancer who were not receiving chemotherapy and an increased risk of blood clots was observed in patients following orthopedic surgery.

On March 21, 2007, two House of Representatives subcommittees opened an investigation into the safety profile of Aranesp and EPOGEN as well as into Amgen's off-label marketing practices. The Chairs of those two subcommittees "ordered" Amgen to halt direct-to-consumer advertising and physician incentives pending further FDA action. On May 8, the FDA noted on its website that Aranesp and EPOGEN "were clearly demonstrated to be unacceptable" in high doses. On May 10, ODAC reconvened and voted to restrict the use of ESAs, to expand existing warnings, and to require ESA manufacturers to conduct further studies.

Defendant Sharer, Amgen's President and CEO, told a Wall Street Journal reporter in an interview that 2007 was the "most difficult [year] in [Amgen's] history." According to Sharer, there was an "unexpected $800 million to $1 billion hit to operating income due to safety concerns" about Aranesp. Sales of Aranesp decreased by fifty percent.

Amgen stock, and thus the Amgen Common Stock Fund, lost significant value as a result of these safety concerns. The class period runs from May 4, 2005, to March 9, 2007. Amgen common stock was at its high of $86.17 on September 19, 2005. On February 16, 2007, when *The Cancer Letter* published its article revealing that Amgen had not been forthcoming about the result of the DAHANCA 10 Trial, Amgen stock sold for $66.73. When ODAC voted to restrict the use of ESA drugs, on or shortly after May 10, the price of Amgen stock dropped to $57.33, the class period low. Between September 19, 2005 and the ODAC vote, the price of Amgen stock dropped $28.83, or thirty-three percent.

On August 20, 2007, plaintiffs Steve Harris, a participant in the Amgen Plan, and Dennis Ramos, a participant in the AML Plan, filed a complaint alleging that defendants breached their fiduciary duties under ERISA. The district court dismissed Harris's claims for lack of standing, on the ground that Harris no longer owned assets in the Amgen Plan on the date he filed his complaint. *Harris v. Amgen, Inc.*, 573 F.3d 728, 731 (9th Cir. 2009). The court dismissed Ramos's claims without leave to amend on the ground that he had failed to identify the proper fiduciaries of the AML Plan. *Id.* We reversed, holding that Harris had standing as a "participant" of the Amgen Plan during the Class Period, and that Ramos should have been allowed to amend the complaint. *Id.*

The complaint now at issue is the First Amended Class Action Consolidated Complaint ("FAC"), filed on March 23, 2010, by five plaintiffs, including Harris and Ramos. The FAC alleges six counts of violation of fiduciary duty under ERISA against Amgen, AML, nine Directors of the Amgen Board ("the Directors"), and the Plans' Fiduciary Committees and their members. The district court dismissed the FAC against Amgen on the ground that it was not a fiduciary. It dismissed the FAC against the remaining defendants under Rule 12(b)(6) for failure to state a claim.

In a separate class action simultaneously pending before the same district judge, investors in Amgen common stock claimed violations of federal securities laws based on the same alleged facts as in the ERISA action now before us. In a careful thirty-five page order, the district court concluded that the investors had sufficiently alleged material misrepresentations and omissions, scienter, reliance, and resulting economic loss to state claims under Sections 10(b) and 20(a) of the 1934 Exchange Act. *See* 15 U.S.C. §§ 78j(b), 78t(a). The district court certified a class based on the facts alleged in the complaint. We affirmed the district court's class certification in *Conn. Ret. Plans & Trust Funds v. Amgen, Inc.*, 660 F.3d 1170 (9th Cir. 2011). The Supreme Court affirmed in *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

For the reasons that follow, we reverse the district court's decision in the ERISA case before us.

II. Standard of Review

"We review *de novo* the district court's grant of a motion to dismiss under Rule 12(b)(6), accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving par-

ty." *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012). "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc.*, 551 U.S. at 322. We then determine whether the allegations in the complaint and information from other permissible sources "plausibly suggest an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (quoting *Iqbal*).

III. Discussion

Congress enacted ERISA to provide "minimum standards ... assuring the equitable character of [employee benefit] plans and their financial soundness." 29 U.S.C. § 1001(a). These minimum standards regulate the "conduct, responsibility, and obligation for fiduciaries of employee benefit plans ...." *Id.* § 1001(b). "Congress painted with a broad brush, expecting the federal courts to develop a 'federal common law of rights and obligations' interpreting ERISA's fiduciary standards." *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042, 1047 (9th Cir. 2000) (en banc) (citation omitted).

The Supreme Court has established certain interpretive rules specific to ERISA's fiduciary duties. These duties, including those governing fiduciary status, "draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment." *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). ERISA reflects a "congressional determination that the common law of trusts did not offer completely satisfactory protection." *Id.* at 497. The law of trusts "often ... inform[s]" but does "not

necessarily determine the outcome of" an interpretation of ERISA's fiduciary duties. *Id.* The common law of trusts offers "only a starting point" that must yield to the "language of the statute, its structure, or its purposes," if necessary. *Id.*

We first address the sufficiency of the FAC against each properly named fiduciary. We then address whether the plaintiffs have adequately alleged that Amgen is a fiduciary.

A. Sufficiency of the FAC

The district court dismissed all six counts of the FAC under Rule 12(b)(6). Plaintiffs have appealed only the dismissal of Counts II through VI.

1. Count II

Plaintiffs allege in Count II that defendants acted imprudently, and thereby violated their duty of care under 29 U.S.C. § 1104(a)(1)(B), by continuing to provide Amgen common stock as an investment alternative when they knew or should have known that the stock was being sold at an artificially inflated price. Defendants originally contended that they were entitled to a "presumption of prudence" under *Quan v. Computer Sci. Corp.*, 623 F.3d 870 (9th Cir. 2010). In our earlier opinion, we held that plaintiffs had satisfied the criteria of *Quan*, such that the presumption of prudence did not apply. The Supreme Court's opinion in *Fifth Third* has now made clear that an ERISA plaintiff does not need to satisfy the criteria we articulated in *Quan*. The Court wrote in *Fifth Third*:

> [T]he law does not create a special presumption favoring ESOP fiduciaries. Rather, the same standard of prudence applies to all ERISA fi-

> duciaries, except that an ESOP fiduciary is under no duty to diversify the ESOP's holdings.

134 S. Ct. at 2467. Defendants are EAIP fiduciaries rather than ESOP fiduciaries, but they do not dispute that *Fifth Third* applies equally to them, and they do not contend that they enjoy a presumption of prudence. However, defendants contend that their actions were prudent even if the presumption of prudence does not apply.

ERISA requires that a fiduciary perform duties under a plan "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). This standard governs a fiduciary's decision to allow investment of plan assets in employer stock. *Quan*, 623 F.3d at 878-79. "This is true, even though the duty of prudence may be in tension with Congress's expressed preference for plan investment in the employer's stock." *Id.* at 879 (internal quotation marks omitted). A "myriad of circumstances" surrounding investments in company stock could support a violation of the prudence requirement. *In re Syncor*, 516 F.3d at 1102. "'A court's task in evaluating a fiduciary's compliance with this standard is to inquire whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment.'" *Quan*, 623 F.3d at 879 (quoting *Wright*, 360 F.3d at 1097) (alterations and quotation marks omitted).

Count II alleges that defendants knew or should have known about material omissions and misrepresen-

tations, as well as illegal off-label sales, that artificially inflated the price of the stock while, at the same time, they continued to offer the Amgen Common Stock Fund as an investment alternative to plan participants. The district court held that, even without the assistance of the presumption of prudence, defendants were entitled to dismissal of Count II under Rule 12(b)(6). We disagree.

We begin by noting that we held in *Syncor* that "[a] violation [of the prudent man standard] may occur where a company's stock ... was artificially inflated during that time by an illegal scheme about which the fiduciaries knew or should have known, and then suddenly declined when the scheme was exposed." *In re Syncor*, 516 F.3d at 1102. In *Syncor*, the company was a fiduciary that knowingly made cash bribes to doctors in Taiwan in violation of the Foreign Corrupt Practices Act. Upon disclosure of these illegal payments, Syncor's stock price lost nearly half its value. "Despite these illegal practices, the [fiduciaries] allowed the Plan to hold and acquire Syncor stock when they knew or had reason to know of Syncor's foreign bribery scheme." *Id.* at 1098. We held on appeal from summary judgment that "there is a genuine issue whether the fiduciaries breached the prudent man standard by knowing of, and/or participating in, the illegal scheme while continuing to hold and purchase artificially inflated Syncor stock for the ERISA Plan." *Id.* at 1103.

In their original briefing, filed before the Court decided *Fifth Third*, defendants made five arguments in favor of dismissal of Count II. None is persuasive. First, defendants argue that investments in Amgen stock during the class period were not imprudent "because Amgen was not even remotely experiencing severe financial difficulties during that time, and remains

a strong, viable, and profitable company today." This argument is beside the point. Amgen was not "experiencing severe financial difficulties" during the relevant time period in part because of the very actions about which plaintiffs are now complaining. That is, Amgen was earning large but unsustainable profits based on improper and unsustainable sales of EPOGEN and Aranesp. Further, Amgen may have been, and may now be, a "strong, viable, and profitable company," but that does not mean that the price of Amgen stock was not artificially inflated during the class period.

Second, defendants argue that the decline in price in Amgen stock was insufficient to show an imprudent investment by the fiduciaries. They write, "[A]s the District Court correctly held, this 'relatively modest and gradual decline in the stock price' does not render the investment imprudent." As an initial matter, we note that the proper question is not whether the investment results were unfavorable, but whether the fiduciary used "'appropriate methods'" to investigate the merits of the transaction. *Quan*, 623 F.3d at 879 (quoting *Wright*, 360 F.3d at 1097); *see also Kirschbaum*, 526 F.3d at 254 (explaining that the "test of prudence is one of conduct, not results"); *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009) (same). But defendants' argument fails even on its own terms. Their argument is foreclosed by the district court's decision in the federal securities class action against Amgen based on the same alleged sequence of events. *See Conn. Ret. Plans & Trust Funds v. Amgen, Inc.*, 660 F.3d 1170 (9th Cir. 2011), *aff'd Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013). If the alleged misrepresentations and omissions, scienter, and resulting decline in share price in *Connecticut Retirement Plans* were sufficient to state a claim that de-

fendants violated their duties under Section 10(b), the alleged misrepresentations and omissions, scienter, and resulting decline in share price in this case are sufficient to state a claim that defendants violated their duty of care under ERISA.

Third, quoting *Kirschbaum*, 526 F.3d at 253, 256, defendants argue that

> [w]hen, like here, retirement plans are at issue, courts must be mindful of "the long-term horizon of retirement investing, as well as the favored status Congress has granted to employee stock investments in their own companies." ... [H]olding fiduciaries liable for continuing to offer the option to invest in declining stock would place them in an "untenable position of having to predict the future of the company stock's performance. In such a case, [a fiduciary] could be sued for not selling if he adhered to the plan, but also sued for deviating from the plan if the stock rebounded."

Defendants' reliance on *Kirschbaum* is misplaced. The court wrote in that case, "The Plan documents, considered as a whole, compel that the Common Stock Fund be available as an investment option for employee-participants." *Kirschbaum*, 526 F.3d at 249. The concerns expressed in *Kirschbaum* have little bearing on the case before us. Here, unlike in *Kirschbaum*, the fiduciaries of the Amgen and AML Plans were under no such compulsion. They knew or should have known that the Amgen Common Stock Fund was purchasing stock at an artificially inflated price due to material misrepresentations and omissions by company officers, as well as by illegal off-label marketing, but they never-

theless continued to allow plan participants to invest in the Fund.

Fourth, quoting *In re Computer Sciences Corp., ERISA Litig.*, 635 F. Supp. 2d 1128, 1136 (C.D. Cal. 2009), *aff'd* 623 F.3d 870 (9th Cir. 2010), defendants argue that if the Amgen Fund had been "remove[d] ... as an investment option," based on nonpublic information about the company, this action "may have brought about 'precisely the result [P]laintiffs seek to avoid: a drop in the stock price.'" The Court wrote in *Fifth Third*:

> To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary would not have viewed as more likely to harm the fund than to help it.

134 S. Ct. at 2472. More specifically, the Court wrote:

> [L]ower courts faced with such claims should also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment—or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held in the fund.

Id. at 2473.

Defendants' argument does not take into account the fact that, quite independently of any obligation under ERISA, the federal securities laws require disclosure of material information. Consider, first, a situation in which the Fund is not removed as an investment option until after the material information has been concealed from the public for a substantial period of time, and the stock price has been substantially inflated as a result. In this situation, the adverse consequences of the removal of the Fund would be no greater than, and probably substantially less than, the consequences of the disclosure required by the securities laws. This is so for several reasons. First, removing the Fund as an investment option would not mean liquidation of the Fund. It would mean only that while the share price is artificially inflated, plan participants would not be allowed to invest additional money in the Fund, and that the Fund would therefore not purchase additional shares at the inflated price. Second, given the relatively small number of Amgen shares that would not be purchased by the Fund in comparison to the enormous number of actively traded shares, it is unlikely that the decrease in the number of shares that would otherwise have been purchased, considered alone, would have an appreciable negative impact on the share price. Finally, if the investing public were to take the removal of the Fund as a negative signal about the value of Amgen stock, any reduction in the stock price would anticipate (and only partially) the inevitable result of Amgen's eventual compliance with the federal securities laws. That is, when the previously concealed material information about the company is eventually revealed as required by the securities laws, the stock price will inevitably decline, almost certainly by more than the amount it would have declined as a result of merely withdraw-

ing the Fund as an investment option. It is thus quite plausible, in this situation, that defendants could remove the Fund from the list of investment options without causing undue harm to plan participants.

Next, consider a situation in which the Fund is removed as an investment option as soon as the fiduciaries—including fiduciaries without disclosure obligations under the federal securities laws—knew or should have known that material information was being withheld from the public. If the fiduciaries with inside knowledge but *without* disclosure obligations act to remove the Fund as an investment option as soon as Amgen's share price begins to be artificially inflated—that is, as soon as those fiduciaries *with* disclosure obligations begin to violate the securities laws—that action may cause those fiduciaries to comply with their obligations under the securities laws. In that event, there will be no artificial increase in the share price, and no corresponding decline at a later time. Even if removal of the Fund as an investment opinion does not cause those defendants with disclosure obligations to comply with the securities laws, its removal will at least protect plan participants from investing in Amgen stock as artificially inflated prices. Removal of the Fund as an investment option might cause a drop in the share price, perhaps slightly more than the amount of any initial artificial inflation. This very drop in stock price might cause the insider fiduciaries with disclosure obligations to comply with the securities laws. But even if the drop in stock price does not cause these fiduciaries to comply, removal of the Fund as an investment option will prevent the greater harm to plan participants that would result if no disclosure is made, if the stock price continues to inflate artificially, and if plan participants are allowed to make continued investments in the Fund

at increasingly inflated prices. In other words, it is quite plausible that in this situation, too, defendants could remove the Fund as an investment option without causing undue harm to plan participants.

We emphasize that any problem created by allowing plan participants to invest in the Fund as it purchased Amgen stock at artificially inflated prices is a problem of the defendants' own making. Both the insider fiduciaries without disclosure obligations under the federal securities laws and those with such obligations have it within their power to prevent harmful investments by plan participants. Insider fiduciaries without disclosure obligations should act to protect plan participants as soon as they know or should know that information of the kind for which disclosure is required under the securities laws is not being released to the public. Insider fiduciaries with disclosure obligations should act to protect plan participants under ERISA as soon as the federal securities laws require disclosure. The fact that the fiduciaries decide not to act at this early stage does not mean that their ERISA fiduciary duties do not apply thereafter. Quite the opposite. It means that they are continuing to violate their fiduciary duties by not acting.

Fifth, defendants argue that "they could not have removed the Amgen Stock Fund based on undisclosed alleged adverse material information—a potentially *illegal* course of action" (emphasis in original). Defendants misunderstand the nature of their duties under federal law. As we noted in *Quan*, "[F]iduciaries are under no obligation to violate securities laws in order to satisfy their ERISA fiduciary duties." *Quan*, 623 F.3d at 882 n.8. The central problem in this case is that Amgen officials, many of whom are defendants here, made material misrepresentations and omissions in vio-

lation of the federal securities laws. Compliance with ERISA would not have required defendants to violate those laws; indeed, we interpret ERISA to require first and foremost that defendants *not* violate those laws. That is, if defendants had revealed material information in a timely fashion to the general public (including plan participants), thereby allowing informed plan participants to decide whether to invest in the Amgen Common Stock Fund, they would have simultaneously satisfied their duties under both the securities laws and ERISA. *See Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1045 (9th Cir. 2001) ("ERISA imposes upon fiduciaries a general duty to disclose facts material to investment issues."); *Acosta v. Pac. Enter.*, 950 F.2d 611, 619 (9th Cir. 1991) (holding that a fiduciary is affirmatively required to "inform beneficiaries of circumstances that threaten the funding of benefits"). Alternatively, if defendants had made no disclosures but had simply not allowed additional investments in the Fund while the price of Amgen stock was artificially inflated, they would not thereby have violated the prohibition against insider trading, for there is no violation absent purchase or sale of stock.

We note that the foregoing analysis presumes that at least some defendants were subject both to ERISA's duty of prudence and to the requirements of the securities laws. On remand from the Supreme Court, defendants assert for the first time that this is not so for all of the defendants. But no defendant made an argument in the district court based on this ground, and nothing in our opinion forecloses a defendant from making such an argument on remand from this court. That is, nothing in our opinion prevents defendants from arguing on remand from this court that their liability, or the extent

of their liability, should depend upon the extent to which they knew, or should have known, that material information was being withheld from the public in violation of the federal securities laws, and the extent that they had, or did not have, an obligation under the those laws to reveal such information to the public.

Finally, defendants argue that *Fifth Third* announced "new pleading requirements" applicable to ERISA cases such as this one. We disagree. The Court wrote as follows:

> We consider more fully one important mechanism for weeding out meritless claims, the motion to dismiss for failure to state a claim. That mechanism ... requires careful judicial consideration of whether the complaint states a claim that the defendant acted imprudently. See Fed. Rule Civ. Proc. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-680 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 5434, 554-563 (2007). Because the content of the duty of prudence turns on "the circumstances ... prevailing" at the time the fiduciary acts, § 1104(a)(1)(B), the appropriate inquiry will necessarily be context specific.

134 S. Ct. at 2471.

To the extent defendants are arguing that *Fifth Third* requires a higher pleading standard of particularity or plausibility, this passage from the Court's opinion makes clear that they are mistaken. *Ashcroft* and *Twombly* had already been decided when this case was first before us on appeal, and the Court's citation of those two cases indicates that it was not articulating a new pleading standard in this sense. To the extent defendants are arguing that the Court has articulated

new standards of liability (as opposed to a new standard of pleading) that we had not previously applied, they are also mistaken. It is true that the Court articulated certain standards for ERISA liability in *Fifth Third*. But we had already assumed those standards when we wrote our earlier opinion. For example, the Court specified in *Fifth Third* that a fiduciary is not required to perform an act that will do more harm than good to plan participants. We had assumed that to be so, and had addressed precisely this point in our earlier opinion. *See Harris v. Amgen*, 738 F.3d at 1041.

We therefore conclude that plaintiffs have sufficiently alleged that defendants have violated the duty of care they owe as fiduciaries under ERISA.

2. Count III

Plaintiffs allege in Count III that defendants violated their duty of loyalty and care under 29 U.S.C. §§ 1104(a)(1)(A) and (B) by failing to provide material information to plan participants about investment in the Amgen Common Stock Fund. Defendants contend that they have limited obligations under ERISA to disclose information to plan participants, and that their disclosure obligations do not extend to information that is material under the federal securities laws. Defendants contend, further, that plaintiffs have not alleged detrimental reliance by plan participants on defendants' omissions and misrepresentations. Finally, defendants contend that their omissions and misrepresentations, if any, were not made in their fiduciary capacity. We disagree.

To some extent, the analysis for Count II overlaps with the analysis for Count III. We have already established that there is no contradiction between defendants' duty under the federal securities laws and

ERISA. Indeed, properly understood, these laws are complementary and reinforcing.

Defendants' first argument is that they owe no duty under ERISA to provide material information about Amgen stock to plan participants who must decide whether to invest in such stock. In other words, defendants contend that their fiduciary duties of loyalty and care to plan participants under ERISA, with respect to company stock, are less than the duty they owe to the general public under the securities laws. Defendants are wrong, as we made clear in *Quan*:

> We have recognized [that] ... "[a] fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information." *Barker [v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995)]. "[T]he same duty applies to 'alleged material misrepresentations made by fiduciaries to participants regarding the risks attendant to fund investment.'" *Edgar [v. Avaya Inc.*, 503 F.3d 340, 350 (3d Cir. 2007)].

Quan, 623 F.3d at 886. We specifically endorsed the Third Circuit's definition of materiality in *Quan*. We wrote, "[A] misrepresentation is 'material' if there was a substantial likelihood that it would have misled a reasonable participant in making an adequately informed decision about whether to place or maintain monies in a particular fund." *Id.* (quoting *Edgar*, 503 F.3d at 350) (internal quotation marks omitted).

Defendants' second argument is that plaintiffs have failed to show that they relied on defendants' material omissions and misrepresentations. Defendants contend that plaintiffs must show that they actually relied on

the omissions and misrepresentations. It is well established under Section 10(b) that a defrauded investor need not show actual reliance on the particular omissions or representations of the defendant. Instead, as the Supreme Court explained in *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), the investor can rely on a rebuttable presumption of reliance based on the "fraud-on-the-market" theory:

> According to that theory, "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." [*Basic, Inc. v. Levinson*, 485 U.S. 224, 246 (1988)]. Because the market "transmits information to the investor in the processed form of a market price," we can assume, the Court explained [in *Basic*], that an investor relies on public misstatements whenever he "buys or sells stock at the price set by the market." *Id.*[] at 244, 247.

Erica P. John Fund, 131 S. Ct. at 2185; *see also Conn. Ret. Plans & Trust*, 133 S. Ct. 1184 (2013). We see no reason why ERISA plan participants who invested in a company stock fund whose assets consisted solely of publicly traded common stock should not be able to rely on the fraud-on-the-market theory in the same manner as any other investor in a publicly traded stock.

Defendants' final argument is that statements made to the Securities and Exchange Commission in documents required by the federal securities laws were not made in a fiduciary capacity, and that these statements therefore cannot be considered in an ERISA suit for breach of fiduciary duty. Although our circuit has not decided the issue, defendants might be correct if

these documents had only been filed and distributed as required under the securities laws, for such acts would have been performed in a corporate capacity. *See Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1285 (11th Cir. 2012) ("When the defendants in this case filed the Form S-8s and created and distributed the stock prospectuses, they were acting in their corporate capacities and not in their capacity as ERISA fiduciaries."); *Kirschbaum*, 526 F.3d at 257 ("REI was discharging its corporate duties under the securities laws, and was not acting as an ERISA fiduciary."). However, defendants did more than merely file and distribute the documents as required by the securities laws. *See Varity Corp.*, 516 U.S. at 504 (fiduciary may be "communicating with [plan participants] *both* in its capacity as employer *and* in its capacity as plan administrator") (emphasis in original).

As they were required to do under ERISA, defendants prepared and distributed summary plan descriptions ("SPDs") to Plan participants. *See* 29 U.S.C. § 1022(a) (requiring fiduciaries to provide a summary plan description). In the SPDs for both the Amgen and the AML Plans, defendants explicitly incorporated by reference Amgen's SEC filings, including "The Company's Annual Report on Form 10-K for the year ending December 31, 2006," and "The Company's Current Reports on Form 8-K filed on January 19, 2007, February 20, 2007, March 2, 2007, and March 12, 2007, respectively." Plaintiffs allege that the defendants knew or should have known that statements contained in these filings, incorporated by reference into the SPDs, were materially false and misleading.

We hold that defendants' preparation and distribution of the SPDs, including their incorporation of Amgen's SEC filings by reference, were acts per-

formed in their fiduciary capacities. In so holding, we agree with the Sixth Circuit, which has held that such incorporation by reference is an act performed in a fiduciary capacity:

> Defendants exercised discretion in choosing to incorporate the [SEC] filings into the Plan's SPD as a direct source of information for Plan participants about the financial health of [the company] and the value of its stock, an investment option under the plan. The SPD is a fiduciary communication to plan participants and selecting the information to convey through the SPD is a fiduciary activity. Moreover, whether the fiduciary states information in the SPD itself or incorporates by reference another document containing that information is of no moment. To hold otherwise would authorize fiduciaries to convey misleading or patently untrue information through documents incorporated by reference, all while safely insulated from ERISA's governing reach. Such a result is inconsistent with the intent and stated purposes of ERISA ... and would create a loophole in ERISA large enough to devour all its protections.

Dudenhoefer v. Fifth Third Bancorp, 692 F.3 410, 423 (6th Cir. 2012) (internal citation omitted); *see also In re Citigroup ERISA Litigation*, 662 F.3d 128, 144-45 (2d Cir. 2011) (noting that SEC filings had been incorporated in the Plans' SPDs, but dismissing ERISA claim on the ground that plaintiffs had not sufficiently alleged that the defendant fiduciaries knew or should have known that the filings contained false information); *Quan*, 623 F.3d at 886 (assuming, "without deciding, that alleged misrepresentations in SEC disclosures

that were incorporated into communications about an ERISA plan are 'fiduciary communications' on which an ERISA misrepresentation claim can be based.") (citations omitted). The statements made in Amgen's SEC filings and incorporated in the Plans' SPDs may therefore be used under ERISA to show that defendants knew or should have known that the price of Amgen shares was artificially inflated, and to show that plaintiffs presumptively detrimentally relied on defendants' statements under the fraud-on-the-market theory.

We therefore conclude that plaintiffs have sufficiently alleged that defendants have violated the duty of loyalty and care they owe as fiduciaries under ERISA. We emphasize, however, as to Counts II and III, that we have decided only that the complaint contains allegations with a sufficient degree of plausibility to survive a motion to dismiss under Rule 12(b)(6). A determination whether defendants have actually violated their fiduciary duties requires fact-based determinations, such as the likely effect of the alternative actions available to defendants, to be made by the district court on remand, with the assistance of expert opinion as appropriate.

3. Counts IV and V

The district court correctly concluded that Counts IV and V are derivative of Counts II and III. Because we reverse the district court's dismissal of Counts II and III, we also reverse its dismissal of Counts IV and V. *See In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

4. Count VI

Count VI alleges that defendants caused the Plans directly or indirectly to sell or exchange property with

a party-in-interest, in violation of 29 U.S.C. § 1106(a). Specifically, Count VI alleges that Amgen and AML are parties-in-interest that concealed material information in order to inflate the price of Amgen stock sold to the Plans. In relevant part, 29 U.S.C. § 1106(a)(1) provides,

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
>
> > (A) sale or exchange, or leasing, of any property between the plan and a party in interest; ...
> >
> > (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan[.]

A party in interest includes "any fiduciary" of a plan or "an employer" of the plan beneficiaries. 29 U.S.C. § 1002(14).

Defendants did not argue in the district court that Count VI fails to state a prohibited transaction claim under § 1106(a)(1). Nor do they raise this argument on appeal. Instead, defendants argue that 29 U.S.C. § 1108(e) exempts the sale of employer stock from the restrictions of § 1106(a)(1).

Section 1108(e) specifies that § 1106 does not prohibit the purchase or sale of employer stock if, as relevant here, (1) the sale price was the "price ... prevailing on a national securities exchange"; (2) no commission is charged for the transaction, and (3) the plan is an EIAP. 29 U.S.C. §§ 1107(d)(5), (e)(1), 1108(e). In *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996), we held that because § 1108(e) is an affirmative defense, a de-

fendant has the burden to prove its applicability. We explained, "A fiduciary who engages in a self-dealing transaction pursuant to 29 U.S.C. § [1106(a)] has the burden of proving that he fulfilled his duties of care and loyalty and that the ESOP received adequate consideration [under § 1108(e)]." *Id.*; *see also Marshall v. Snyder*, 572 F.2d 894, 900 (2d Cir. 1978) ("The settled law is that in [prohibited self-dealing transactions] the burden of proof is always on the party to the self-dealing transaction to justify its fairness [under a statutory exception]."). Citing *Howard*, the Eighth Circuit has held that a plaintiff need not plead in his complaint that a transaction was not exempt under § 1108(e). *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 600-01 (8th Cir. 2009); *see also Jones v. Bock*, 549 U.S. 199, 211-12 (2007) (holding that a plaintiff need not plead the absence of an affirmative defense, even a defense like exhaustion of remedies, which is "mandatory").

Because the existence of an exemption under § 1108(e) is an affirmative defense, we can dismiss Count VI based on the § 1108(e) exemption only if the defense is "clearly indicated" and "appear[s] on the face of the pleading." 5B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1357 (3d ed. 2004); *see also Jones*, 549 U.S. at 215 (citing Wright & Miller for rule that affirmative defense must appear on the face of the complaint). Here, we cannot say that the face of the complaint clearly indicates the availability of a § 1108(e) defense.

B. Amgen as Properly Named Fiduciary

Amgen argues that it is not a fiduciary under the Plan because it has delegated its discretionary authority. "To be found liable under ERISA for breach of the duty of prudence and for participation in a breach of

fiduciary duty, an individual or entity must be a 'fiduciary.'" *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1101 (9th Cir. 2004). In defining a fiduciary, ERISA says,

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets ... or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). "We construe ERISA fiduciary status 'liberally, consistent with ERISA's policies and objectives.'" *Johnson v. Couturier*, 572 F.3d 1067, 1076 (9th Cir. 2009) (quoting *Ariz. State Carpenters Pension Trust Fund v. Citibank*, 125 F.3d 715, 720 (9th Cir. 1997)). Whether a defendant is a fiduciary is a question of law we review de novo. *See Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996).

Under ERISA, a "named fiduciary" is "a fiduciary who is named in the plan instrument." 29 U.S.C. § 1102(a)(2). The Amgen Plan provides that Amgen is "the 'named fiduciary,' 'administrator[,]' and 'plan sponsor' of the Plan (as such terms are used in ERISA)." ERISA grants a named fiduciary broad authority to "control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1). "Generally, if an ERISA plan expressly provides for a procedure allocating fiduciary responsibilities to persons other than named fiduciaries under the plan, the named fiduciary is not liable for an act or omission of such person in carrying out such responsibility." *Ariz. State Carpenters*, 125 F.3d at 719-20 (citing 29 U.S.C. § 1105(c)(2)).

Amgen argues that it delegated authority to trustees and investment managers. Section 15.1 of the Plan provides, "To the extent that the Plan requires an action under the Plan to be taken by the Company [Amgen], the party specified in this Section 15.1 shall be authorized to act on behalf of the Company." Section 15.1 says nothing about delegation to trustees and investment managers. Rather, it explains that the Fiduciary Committee has the authority, on behalf of the Company, to "review the performance of the Investment Funds ... and make recommendations" and to "otherwise control and manage the Plan's assets." In the absence of a Fiduciary Committee, the Global Benefits Committee will perform these tasks. Section 14.2 of the Plan governs the relationship between Amgen ("the Company") and the trustees and managers. It provides:

> The Trustee shall have the exclusive authority and discretion to control and manage assets of the Plan it holds in trust, except to the extent that ... the Company directs how such assets shall be invested [or] the Company allocates the authority to manage such assets to one or more Investment Managers. Each Investment Manager shall have the exclusive authority to manage, including the authority to acquire and dispose of, the assets of the Plan assigned to it by the Company, except to the extent that the Plan prescribes or the Company directs how such assets shall be invested. Each Trustee and Investment Manager shall be solely responsible for diversifying, in accordance with Section 404(a)(1)(C) of ERISA, the investment of the assets of the Plan assigned to it by the Committee, except to the extent that

> the plan prescribes or the Committee directs how such assets shall be invested.

ERISA requires that a trustee hold plan assets in trust for plan participants. 29 U.S.C. § 1103(a). A trustee has "exclusive authority and discretion to manage and control the assets of the plan" subject to two exceptions. *Id.* The first exception is that a plan may "expressly provide[] that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee." *Id.* § 1103(a)(1). Under this exception, a named fiduciary with the power to direct trustees is a fiduciary with authority to manage plan assets. The second exception is that an "investment manager," duly licensed as an investment adviser under federal or state law, may also be appointed to manage plan assets in lieu of the trustee. *Id.* §§ 1002(38)(B), 1103(a)(2).

There is no question that Amgen appointed a trustee. However, nothing in the record indicates that Amgen appointed an investment manager. Neither ERISA nor the Plan requires that an investment manager be appointed. Even if Amgen had appointed an investment manager, the Plan makes clear that the trustee and any investment manager do not have complete control over investment decisions. *See* 29 U.S.C. § 1002(21)(A)(i) (defining a person with "*any* authority or control" over plan assets to be a fiduciary) (emphasis added); *cf. Gelardi v. Pertec Comp. Corp.*, 761 F.2d 1323, 1325 (9th Cir. 1985) (finding delegation where defendant "retained *no* discretionary control") (emphasis added), *overruled on other grounds in Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1207 (9th Cir. 2011).

Section 15.1 of the Plan, which authorizes the Fiduciary Committee to take action on behalf of Amgen,

does not preclude fiduciary status for Amgen. In *Madden v. ITT Long Term Disability Plan for Salaried Empl.*, 914 F.2d 1279, 1284 (9th Cir. 1990), we held that the company had delegated authority to an administration committee where the plan provided that the Committee had "'responsibility for carrying out all phases of the administration of the Plan'" and had the "'exclusive right ... to interpret the Plan and to decide any and all matters arising hereunder.'" (emphasis omitted). This language contains two features absent from the language in the Amgen Plan. First, it delegates responsibility for all phases of administering the plan, rather than responsibility "to the extent that the Plan requires an action ... to be taken by the Company." Second, and more important, it provides the Committee the exclusive right to make decisions under the plan. The Amgen Plan merely authorizes the Fiduciary Committee to act on behalf of Amgen. It neither provides exclusive authority to the Committee, nor precludes Amgen from acting on its own behalf.

Other courts have found a company's grant of exclusive authority to a delegate and an express disclaimer of authority to be critical. In *Maher v. Massachusetts General Hospital Long Term Disability Plan*, 665 F.3d 289 (1st Cir. 2011), the First Circuit held that a hospital had delegated its fiduciary duties when the plan stated, "'The Hospital shall be fully protected in acting upon the advice of any such agent ... and shall not be liable for any act or omission of any such agent, the Hospital's only duty being to use reasonable care in the selection of any such agent.'" *Id.* at 292. In *Costantino v. Washington Post Multi-Option Benefits Plan*, 404 F. Supp. 2d 31 (D.D.C. 2005), the district court for the District of Columbia found delegation when the plan granted the plan administrator "'sole and absolute

discretion'" to carry out various Plan duties. *Id.* at 39 n.8. Given that ERISA allows fiduciaries to have overlapping responsibilities under a plan, a clear grant of exclusive authority is necessary for proper delegation by a fiduciary. *See* 29 U.S.C. § 1102(a)(1) ("[O]ne or more named fiduciaries ... jointly or severally ... have authority to control and manage the operation and administration of the plan"); *see also* 1 ERISA Practice and Litigation § 6:5 ("Those who wish to avoid liability exposure through allocation of plan responsibilities to others must therefore take pains to ensure that their documents fully authorize the contemplated delegation.").

Because the Plan contains no clear delegation of exclusive authority, we reverse the district court's dismissal of Amgen from the case as a non-fiduciary.

Conclusion

We conclude that defendants are not entitled to a presumption of prudence, that plaintiffs have stated claims under ERISA in Counts II through VI, and that Amgen is a properly named fiduciary under the Amgen Plan. We therefore reverse the decision of the district court and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-5442-PSG (PLAx)

Date: June 18, 2010

STEVE HARRIS, *et al.*

v.

AMGEN, INC., *et al.*

CIVIL MINUTES—GENERAL

* *

Proceedings: (In Chambers) Order Granting Defendants' Motion to Dismiss with Prejudice

Pending before the Court is Defendants' Motion to Dismiss. A hearing on the motion was held on June 16, 2010. After considering the moving and opposing papers and arguments presented at the hearing, the Court GRANTS Defendants' motion to dismiss.

I. Background

This case concerns the management of two eligible individual account plans ("EIAPs"): the Amgen Retirement and Savings Plan (the "Amgen Plan") and the Retirement and Savings Plan for Amgen Manufacturing, Ltd. (the "AML Plan") (collectively, the "Plans"). The parties are familiar with the general allegations

and procedural history in this case, as summarized in the Court's March 2, 2010 Order Granting Defendants' Motion to Dismiss (the "Order"). *See Harris v. Amgen, Inc.*, 2010 WL 744123, at *1-*2 (C.D. Cal. Mar. 2, 2010). In the Order, the Court dismissed the Class Action Consolidated Complaint filed by Plaintiffs Steve Harris, Dennis Ramos, Jorge Torres, and Albert Cappa (collectively, "Plaintiffs") with leave to amend. *See id.* at *15.

On March 23, 2010, Plaintiffs filed a First Amended Class Action Consolidated Complaint ("FAC"), asserting the same six causes of action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132: (1) breach of the fiduciary duty of loyalty, (2) breach of the fiduciary duty of care, (3) breach of the fiduciary duty to provide complete and accurate information, (4) breach of the fiduciary duty to monitor, (5) co-fiduciary liability, and (6) "party-in-interest" liability. Aside from naming several new defendants, the FAC offers few new allegations. Indeed, some of the new "allegations" are simply legal assertions intended to defeat an anticipated motion to dismiss. *See, e.g.*, *FAC* ¶ 87 ("The Amgen Plan participants *adequately allege* that Defendants are ERISA fiduciaries ... they have *adequately stated a claim* for breach of the duty to disclose." (emphasis added)).

On April 20, 2010, Defendants Amgen Inc. ("Amgen"), Amgen Manufacturing, Ltd. ("AML"), Kevin W. Sharer ("Sharer"), Charles Bell, Frank Biondi, Jr., Jerry Choate, Frank Herringer, Gilbert Omenn, David Baltimore, Judith Pelham, Frederick Gluck, Leonard Schaeffer, Jacqueline Allred, Raul Cermeno, Jackie Crouse, Lori Johnston, Michael Kelly, and the Fiduciary Committee (collectively, "Defendants") filed a motion to dismiss.

II. Discussion

The Court incorporates by reference the relevant legal standard set forth in the prior Order, *see Harris*, 2010 WL 744123, at *2-*3, and limits the discussion to the new allegations presented in the FAC and the new arguments raised in the papers. Defendants move to dismiss the FAC on the grounds that Plaintiffs have again failed to identify the proper plan fiduciaries, *see Mot.* 9:6-11:26, and failed to offer sufficient allegations to state any of their claims, *see id.* 12:1-25:10. While Plaintiffs are closer to the mark in identifying the proper defendants, they fail to offer sufficient allegations to survive Defendants' motion to dismiss.

A. Whether Plaintiffs Identify the Proper Fiduciaries of the Plans

As a threshold matter, only fiduciaries may be held liable under ERISA for breach of fiduciary duty. *See Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1001 (9th Cir. 2004). A person's liability as a fiduciary is limited "to the extent" that he acts in a fiduciary capacity. *See* 29 U.S.C. § 1002(21)(A) ("[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.").

In the prior Order, the Court granted Defendants' motion to dismiss as to all defendants with the exceptions of AML, Kevin W. Sharer, the Global Benefits

Committee ("GBC"), and the Fiduciary Committee. *See Harris*, 2010 WL 744123, at *5-*8. Plaintiffs have returned with a modified slate of defendants.[1] The GBC is no longer named as a defendant, and Plaintiffs now unequivocally allege that the GBC was never constituted. *See FAC* ¶ 46. Furthermore, Plaintiffs have deleted their allegation that Sharer was a member of the Fiduciary Committee. *See id.* ¶ 32. In the prior Order, the Court noted Defendants' argument "that Sharer 'never served on the Fiduciary Committee' and that Plaintiffs have known this fact for two years." *Harris*, 2010 WL 744123, at *7.

Most significantly, the FAC drops the "Individual Defendants"—with the exception of Charles Bell—and replaces them with the alleged members of the Fiduciary Committee during the Class Period (May 4, 2005 through March 9, 2007). *See id.* ¶¶ 37-48. In the motion, Defendants seek dismissal for failure to adequately allege fiduciary status only as to "Amgen, AML, and the Director Defendants." *Mot.* 11:25-26.

1. Amgen

The Court previously dismissed Plaintiffs' claims as to Amgen. *See Harris*, 2010 WL 744123, at *8-*9. However, Plaintiffs fail to offer any new allegations concerning Amgen's fiduciary status with respect to the Plans. Though Amgen is named the "plan sponsor" of the Amgen Plan, *see FAC* ¶ 24; *RJN*, Ex. 5, at 207,

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[1] The Court separates Defendants into various categories: the "Entity Defendants" are Amgen and AML; the "Director Defendants" are Kevin W. Sharer, Charles Bell, Frank Biondi, Jr., Jerry Choate, Frank Herringer, Gilbert Omenn, David Baltimore, Judith Pelham, Frederick Gluck, and Leonard Schaeffer; and the "Fiduciary Committee Defendants" are Jacqueline Allred, Raul Cermeno, Jackie Crouse, Lori Johnston, and Michael Kelly.

Amgen delegated its fiduciary responsibilities to the GBC and the Fiduciary Committee, *see RJN*, Ex. 5, at 207.[2] Plaintiffs argue that the fiduciary responsibilities reverted back to Amgen when Amgen failed to constitute the GBC. *See Opp.* 7:5-16. Nevertheless, the Amgen Plan delegates fiduciary responsibilities and discretion to the Fiduciary Committee even in the event that the GBC is not constituted. *See id.* at 208 ("[I]f at any time the Board or one of its duly appoint[ed] delegates has not appointed a Global Benefits Committee, the Fiduciary Committee shall have the right to appoint and remove Trustees and Investment Managers and otherwise control and manage the [Amgen] Plan's assets in accordance with Section 14.1."). Furthermore, as noted in the Court's prior Order, Amgen does not become a fiduciary simply because its employees served as fiduciaries. *See Harris*, 2010 WL 744123, at *6 (citing *Tool v. Nat. Employee Benefit Servs., Inc.*, 957 F. Supp. 1114, 1121 (N.D. Cal. 1996)). Therefore, the Court GRANTS Defendants' motion to dismiss as to Amgen.

2. AML

AML was the named fiduciary of the AML Plan. *See FAC* ¶ 25; *RJN*, Ex. 7, at 310. In the prior Order, the Court declined to dismiss Plaintiffs' claims against AML for failure to allege AML's fiduciary status because Defendants failed to cite to any plan document that purported to delegate AML's fiduciary responsibilities. *See Harris*, 2010 WL 744123, at *6. Defendants

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[2] In the prior Order, the Court took judicial notice of several exhibits and considered other exhibits under the doctrine of incorporation by reference. *See Harris*, 2010 WL 744123, at *3-*4. Defendants provide courtesy copies of these exhibits for the Court to consider in resolving this motion. *See* Dkt. #185.

even promised at the hearing on that motion to provide such a citation to the Court, but failed to do so. *See id.* at *6 n.8. Again, Defendants conspicuously fail to demonstrate that AML actually delegated its fiduciary responsibilities. *See Opp.* 6:22-2. Accordingly, the Court does not grant Defendants' motion as to AML on this ground.

3. Director Defendants

Plaintiffs again contend that Director Defendants assumed fiduciary responsibilities when the Board directly appointed the members of the Fiduciary Committee. *See Opp.* 7:18-21. Oddly, Plaintiffs rely on language taken from § 15.1(b) of the Amgen Plan, which states in full:

> [I]f at any time the Board ... has not appointed a Global Benefits Committee, the *Fiduciary Committee* shall have the right to appoint and remove Trustees and Investment Managers and otherwise control and manage the Plan's assets in accordance with Section 14.1.

RJN, Ex. 5, at 208 (emphasis added). In addition to this "*ultra vires*" argument—as Plaintiffs referred to it in their opposition to the previous motion to dismiss—Plaintiffs offer the same conclusory allegations that Director Defendants were "de facto" fiduciaries. *See, e.g.*, *FAC* ¶ 33. The Court previously rejected such allegations in clear and uncertain terms. *See Harris*, 2010 WL 744123, at *6 (citing *In re Calpine Corp. ERISA Litig.*, No. 03-1685, 2005 WL 1431506, at *3 (N.D. Cal. Mar. 31, 2005)).

Despite the FAC's shortcomings in this respect, Director Defendants are not necessarily free from all potential liability under ERISA. *See In re Calpine*,

2005 WL 1431506, at *3 ("Director Defendants' power of appointment gives rise to a limited duty to monitor their appointees, as discussed in 29 C.F.R. § 2509.75-8 ...."). In the FAC, Plaintiffs add allegations that each Director Defendant "had the power and authority to appoint and remove members of the Amgen Plan Fiduciary Committee." *See, e.g., FAC* ¶ 35; *see also id.* ¶ 59 (noting that "Defendants were fiduciaries to the extent of the specific fiduciary discretion and authority assigned to or exercised by each of them"). Thus, Director Defendants could conceivably be held liable "to the extent" that they selected the members of the Fiduciary Committee. Therefore, the Court does not grant Defendants' motion as to Director Defendants on this ground.

4. Summary

The Court grants Defendants' motion for failure to adequately allege fiduciary status only as to Amgen. At this stage in the analysis, all claims remain as to AML, Fiduciary Committee Defendants, and the Fiduciary Committee. Additionally, Plaintiffs' claims remain as to Director Defendants to the extent that they relate to Director Defendants' appointment of plan fiduciaries. The Court now proceeds to evaluate the sufficiency of Plaintiffs' claims against these fiduciaries.

B. Whether Plaintiffs State a Claim under ERISA

Defendants move to dismiss each of Plaintiffs' six causes of action for failure to adequately allege a breach of fiduciary duty. As a preliminary matter, Defendants suggest that the FAC should be dismissed as to *all* Defendants on the grounds that Plaintiffs improperly "lump" all Defendants together without delineating the particular breaches relevant to each. *See Mot.* 11:16-18; *see also In re Providian Fin. Corp. ERISA Litig.*, 2002

WL 31785044, at *1 (N.D. Cal. 2002); *In re McKesson*, 2002 WL 31431588, at *17-*18 (N.D. Cal. 2002).[3] In the opposition, Plaintiffs cite to other persuasive authority that suggests more general allegations are sufficient at the pleadings stage. *See Opp.* 8 n.11 (citing *Rankin v. Rots*, 278 F. Supp. 2d 853, 866 (E.D. Mich. 2003), and *Kelley v. Household Int'l, Inc.*, No. 02-9281, 2004 WL 723843, at *4 (N.D. Ill. Mar. 31, 2004)). While more specific allegations would have been preferable, the Court does not dismiss Plaintiffs' claims on this ground, and thus proceeds to consider the adequacy of Plaintiffs' allegations against Defendants. The Court begins with Plaintiffs' second cause of action concerning Defendants' alleged imprudence in continuing to offer Amgen common stock under the Plans during the Class Period. The Court then considers the adequacy of Plaintiffs' new allegations as to the other causes of action.

1. Beach of the Duty of Care (Count II)

The papers concentrate on Plaintiffs' claim that Defendants breached the fiduciary duty of care by failing to take Amgen common stock out of the Plans. In particular, Plaintiffs argue that the FAC adequately alleges that "Defendants breached their fiduciary duty to act with prudence by (1) continuing to offer the Amgen Stock Fund as [a] retirement savings option for the Plans; (2) permitting the Plans to acquire and hold Amgen Stock instead of cash or other investments; and (3) failing to take adequate steps to prevent the Plans

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[3] Defendants appear to limit this argument to Amgen, AML, and the Director Defendants because Defendants immediately follow their discussion of *In re Providian*, 2002 WL 31785044, and *In re McKesson*, 2002 WL 31431588, with the conclusion, "Thus, all counts against Amgen, AML, and the Director Defendants should be dismissed." *Mot.* 11:20-26.

from suffering losses on their investment in Amgen Stock." *Opp.* 9:5-10 (citing *FAC* ¶¶ 100-270). As with the prior Order, the Court evaluates Plaintiffs' allegations according to the two standards that have been applied in the Ninth Circuit: the "*Moench* standard" and the "prudent man standard."

This time around, however, Plaintiffs raise a new argument as to why the *Moench* standard should not apply in this case. Plaintiffs argue that the *Moench* standard applies only to Employee Stock Ownership Plans ("ESOPs") and EIAPs that require investment in company stock. *See Opp.* 14:16-16:5. The *Moench* standard was originally devised to protect plan fiduciaries from being placed in an untenable position (a "razor's edge"), with fiduciaries simultaneously being required (1) to encourage employee ownership of company stock pursuant to the plan documents and (2) to dissuade employee ownership of company stock pursuant to ERISA's duty of prudence and in violation of the plan documents. *See Moench*, 62 F.3d at 568-69. Plaintiffs claim that the Plans did not require employee investment in Amgen common stock and that Defendants had full discretion to offer any investment options. *See Opp.* 15:13-15. Thus, Defendants would not have been placed on the so-called "razor's edge" if they withdrew the Amgen common stock option—they would have been able to act "prudently" without violating the terms of the Plans. *See Lingis v. Motorola, Inc.*, 649 F. Supp. 2d 861, 879 (N.D. Ill. 2009) (holding that the presumption of prudence did not apply where the plan documents stated that plan funds "may" be invested employer stock).

In response to this argument, Defendants do not directly dispute Plaintiffs' contention that the Plans did not require offering the Amgen Stock Fund as an in-

vestment option.[4] Instead, Defendants target the legal authority relied upon in Plaintiffs' opposition—*Gearren v. McGraw-Hill Cos., Inc.*, 690 F. Supp. 2d 254 (S.D.N.Y. Feb. 10, 2010), and *In re Gen. Growth Properties, Inc. ERISA Litig.*, 2010 WL 1840245 (N.D. Ill. May 6, 2010). As noted by Defendants, these cases do not expressly hold that the *Moench* standard applies only when plan fiduciaries are required to invest in employer stock. The *Gearren* court declined to define the "outer bounds" of the *Moench* standard. *See Gearren*, 690 F. Supp. 2d at 269 ("[D]oes the presumption apply to ... a plan in which fiduciaries choose to offer company stock as an act of freely exercised discretion? ... Although these and similar concerns might dissuade the Court from applying the presumption of prudence to *all* decisions concerning EIAPs, the cases at hand do not require it to set the outer bounds of the presumption's applicability."). The other case cited by Plaintiffs, *General Growth*, went further to note that "courts have ... extended the presumption of prudence to fiduciaries of ESOP or EIAPs that *encourage* but do not require company investment." *Gen. Growth*, 2010 WL 1840245, at *6 (emphasis added).

In this case, however, the Court does not decide whether the *Moench* standard applies because, under either the *Moench* standard or the prudent man stand-

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[4] The January 1, 2007 amendment to the Amgen Plan required the Fiduciary Committee to offer the Company Stock Fund as an investment option, the amendment went into effect on May 7, 2008, after the close of the Class Period. *See RJN*, Ex. 13, at 398. Prior to the amendment, the Amgen Plan granted plan fiduciaries the discretion to invest in the Company Stock Fund, *see RJN*, Ex. 5, at 186-87, and plan participants were not directly encouraged to invest in the Amgen Common Stock Fund, listed as the 24th option among 25 investment funds, *see RJN*, Ex. 6, at 243-42.

ard, Plaintiffs have failed to allege sufficient facts to state a claim for breach of the fiduciary duty of care.

a. The *Moench* Standard

Under the *Moench* standard, an EIAP plan fiduciary is entitled to a presumption of prudence, unless "the ERISA fiduciary could not have believed reasonably that continued adherence to the [plan's terms] was in keeping with the settlor's expectations of how a prudent trustee would operate." *Wright*, 360 F.3d at 1097 (quoting *Moench*, 62 F.3d 553); *see also Edgar v. Avaya, Inc.*, 503 F.3d 340, 347 (3d Cir. 2007) (extending the *Moench* standard to EIAPs because "one of the purposes of EIAPs is to promote investment in employer securities, [and] they are subject to many of the same exceptions that apply to ESOPs").[5] In order to rebut the presumption of prudence, a plaintiff must provide "detailed and specific allegations that [the defendant company] was in dire financial circumstances and subject to serious mismanagement." *In re Fremont Gen. Corp. Litig.*, 564 F. Supp. 2d 1156, 1158 (C.D. Cal. 2008).

While some district courts have declined to apply the presumption of prudence at the pleadings stage, *see, e.g., Alvidres v. Countrywide Fin. Corp.*, No. 07-5810, 2008 WL 819330, at *2 (C.D. Cal. Mar. 18, 2008), the *Moench* standard has been applied to motions to

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[5] The Court discussed the lineage of the "*Moench* standard" and its history in the Ninth Circuit in the prior Order. *See Harris v. Amgen, Inc.*, 2010 WL 744123, at *9. As summarized in the Order, several district courts have applied the *Moench* standard, even at the pleadings stage, and the Ninth Circuit has twice declined to reject it. *See id.* Furthermore, the standard has been formally adopted by three other sister circuits in addition to the Third Circuit—the First, Fifth, and Sixth Circuits. *See id.*

dismiss, *see Wright*, 360 F.3d at 1097; *Gearren*, 690 F. Supp. 2d at 270 ("[I]t is more accurate to say that when the presumption of prudence applies, it affects whether a given allegation can plausibly constitute a breach of fiduciary duty."). The Court previously dismissed Plaintiffs' claim for breach of the fiduciary duty of care for, *inter alia*, failure to adequately allege that Amgen was seriously mismanaged and in dire financial straits. *See Harris*, 2010 WL 744123, at *10-*12.

Assuming the *Moench* standard applies, Plaintiffs have failed to rebut the presumption of prudence. In the FAC, Plaintiffs offer additional details regarding the importance of Aranesp® off-label sales to Amgen's financial success. *See FAC* ¶¶ 178, 182, 185-187 (detailing how sales of Aranesp for off-label uses for the fourth quarter of 2006 accounted for 39% of overall Aranesp sales, how Aranesp sales accounted for approximately 30% of Amgen's total sales in 2006, and how Aranesp's and Epogen's combined sales accounted for approximately 50% of Amgen's sales that same year). However, as the Court previously held, Plaintiffs must offer sufficient allegations that the *company's* viability was in question. *See In re Lehman Bros. Sec. & ERISA Litig.*, No. 09-2017, 2010 WL 354937, at *5 (S.D.N.Y. Feb. 2, 2010) (noting that the *Moench* standard "requires pleading the fiduciary's knowledge at a pertinent time of 'an imminent corporate collapse or other 'dire situation' sufficient to compel an ESOP sell-off'" (citations omitted)); *Fisher v. JP Morgan Chase & Co.*, No. 03-3252, 2010 WL 1257345, at *9 (S.D.N.Y. Mar. 31, 2010) ("[T]he allegations in this action provide 'no indication' that, during the class period, JP Morgan's 'viability as a going concern was ever threatened.'" (quoting *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 254 (5th Cir. 2008))).

Additionally, Plaintiffs allege that Amgen's stock price declined gradually over the course of the entire Class Period. *See FAC* ¶ 295 (noting that the price of Amgen stock declined 2.3% on the day the Cancer Letter was published); *id.* ¶ 297 (noting a decline of 4% after Amgen announced the SEC's informal inquiry regarding the DAHANCA study); *id.* ¶ 298 (noting a decline of 2.1% the day the Food and Drug Administration announced the black box warning); *id.* ¶ 299 (noting a decline of 9.1% on one day in 2006). Even assuming that Amgen was sufficiently mismanaged, Plaintiffs fail to adequately allege that continued investment in Amgen common stock was imprudent, in light of the relatively modest and gradual decline in the stock price. *See In re Syncor*, 351 F. Supp. 2d at 982 ("In this case, Plaintiffs have pled that the company was facing mismanagement (i.e. the [illegal] bribery scheme) which resulted in a *steep decline* in the value of the company stock." (emphasis added)).

Plaintiffs also offer new allegations that Sharer described 2007 as "the most difficult [year] in [Amgen's] history" and the "most challenging time in [his] 16 years [at Amgen]." *FAC* ¶ 281. Plaintiffs further allege that "[a]s a result of Defendants' serious mismanagement (failure to disclose the safety concerns relating to Aranesp® and Amgen's off-label practices), Amgen los[t] 50% of its sales in Aranesp® and took nearly a $1 billion hit in operating income." *Id.* However, Sharer's descriptions of this "difficult" period do not suffice as allegations that Amgen was in dire financial circumstances. Declines far in excess of Amgen's 29% over the course of the Class Period have been held to be insufficient to rebut the presumption of prudence, *see, e.g., In re Citigroup ERISA Litig.*, 2009 WL 2762708, at *18 (S.D.N.Y. Aug. 31, 2009) (a 52% stock decline), and

Plaintiffs' allegations of Defendants' alleged imprudence are viewed in the context of Amgen's relative success through and after the Class Period, *see Harris*, 2010 WL 744123, at *11 (citing *RJN*, Ex. 4). Moreover, contrary to authority again relied upon by Plaintiffs, Plaintiffs have failed to allege the existence of an illegal scheme, *see In re Syncor*, 516 F.3d at 1098, a sharp decline in the price of Amgen stock, *see In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, No. 05-1151, 2009 WL 790452, at *2 (D.N.J. Mar. 23, 2009), or a dramatic withdrawal of Aranesp or Epogen from the market, *see id.* Therefore, under the *Moench* standard, Plaintiffs' allegations fail to overcome the presumption of prudence. Accordingly, the Court GRANTS Defendants' motion to dismiss Plaintiffs' claim for breach of the fiduciary duty of care on this ground.

b. The Prudent Man Standard

Under the prudent man standard, "a fiduciary [to] discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries ... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims ...."). 29 U.S.C. § 1104(a). While Plaintiffs correctly observe that "a variety of circumstances can form the basis of a claim that company stock is an imprudent investment for participants' retirement savings," *Opp.* 13:4-6 (citing *Fremont*, 564 F. Supp. at 1158), Plaintiffs have again failed to sufficiently allege that this is such a circumstance. Thus, the Court incorporates by reference its analysis in the prior Order as it applies to the prudent man standard. *See Harris*, 2010 WL 744123, at *12-*13.

Assuming Plaintiffs' allegations to be true, Plaintiffs have failed to offer sufficient allegations to suggest that the plan fiduciaries acted imprudently in maintaining the Amgen common stock investment option under the Plans. At most, the price of Amgen shares declined gradually by 29% over a period of one year and a half. Defendants note that the first instance of wrongdoing alleged in the FAC occurred in October 2006, and thus the decline from this time to the end of the Class Period was 20%. *See Mot.* 15 n.16. If Defendants had discontinued the Amgen common stock option during the Class Period, Defendants could have been subject to liability under ERISA when it later rose. *See In re Computer Sciences Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1136 (C.D. Cal. 2009) ("[H]olding fiduciaries liable for continuing to invest in declining stock would place them in an 'untenable position,' as they could also be liable if they ceased investment in the declining stock and it later rebounded."); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 256 (5th Cir. 2008). Moreover, discontinuing the Amgen Stock Fund would have brought "about precisely the result [Plaintiffs] seek to avoid: a drop in the stock price." *See In re Computer Sciences*, 635 F. Supp. 2d at 1136. Finally, Plaintiffs allege in the FAC that "the Federal Securities laws do not preclude Defendants from potential liability." *FAC* ¶ 320. Notwithstanding this conclusory allegation, Defendants would have been required to base their decision to take the Amgen common stock option out of the Plans on the basis of non-public information. *See Wright*, 360 F.3d at 1098 n.4. For these reasons, the Court also GRANTS Defendants' motion to dismiss Plaintiffs' breach of the duty of care claim on this additional ground.

2. The Remaining Claims (Counts I, III, IV, V, and VI)

Plaintiffs fail to offer any new allegations in the FAC that would alter the Court's original decision to dismiss Plaintiffs' remaining claims for (1) breach of the fiduciary duty of loyalty, (2) breach of the fiduciary duty to provide complete and accurate information, (3) breach of the fiduciary duty to monitor, (4) co-fiduciary liability, and (5) "party-in-interest" liability. *See Mot.* 3:1-11. The Court incorporates by reference the analysis of the prior Order with regard to these causes of action. *See Harris*, 2010 WL 74[illegible]123, at *8, *13-*15. Therefore, the Court GRANTS Defendants' motion to dismiss as to the balance of Plaintiffs' claims.

C. Whether Leave to Amend Is Warranted

In the event the Court grants Defendants' motion to dismiss, Plaintiffs request leave to file another amended complaint. *See Opp.* 25:15-22. Ordinarily, courts permit leave to amend upon dismissal of a claim, "unless it determines that the pleading could not possibly be cured by the allegation of other facts." *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citation omitted). The Court considers the following factors in determining whether leave to amend is warranted in a particular case: (1) a party's bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility, and (5) previous amendments. *See Sisseton-Wahpeton Sioux Tribe of Lake Traverse Indian Reservation*, 90 F.3d 351, 355 (9th Cir. 1996). A district court's "discretion to deny leave to amend is particularly broad where [a] plaintiff has previously amended the complaint." *Id.* (quoting *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989)).

This appears to be a securities case posing as an ERISA case. Plaintiffs have had multiple opportunities to refine their claims, but each has failed. Plaintiffs filed an initial complaint, a Consolidated Class Action Complaint, and a First Amended Consolidated Class Action Complaint. In their latest effort, Plaintiffs have failed to offer sufficient allegations to survive a Rule 12(b)(6) motion to dismiss, even though the Court's previous Order included ample instruction as to what would be required for Plaintiffs to state their ERISA claims. The Court finds that leave to amend would be futile in this case. Thus, the Court GRANTS Defendants' motion to dismiss with prejudice.

III. Conclusion

Based on the foregoing, the Court GRANTS Defendants' motion to dismiss with prejudice.

IT IS SO ORDERED.

Initials of Deputy Clerk: ljw for wkh

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-5442-PSG (PLAx)

Date: March 2, 2010

STEVE HARRIS, *et al.*

v.

AMGEN, INC., *et al.*

CIVIL MINUTES—GENERAL

* *

Proceedings: (In Chambers) Order Granting Defendants' Motion to Dismiss with Prejudice

Pending before the Court is Defendants' Motion to Dismiss. A hearing on the motion was held on February 11, 2010. After considering the moving and opposing papers and arguments presented at the hearing, the Court GRANTS Defendants' motion.

I. Background

On August 20, 2007, Plaintiffs Steve Harris ("Harris") and Dennis Ramos ("Ramos") filed a complaint against Amgen, Inc. ("Amgen") and other defendants under § 502(e)(1) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(e)(1). Harris and Ramos sought to represent a class of current and

former employees of Amgen and Amgen's subsidiaries who participated in the Amgen Retirement and Savings Plan ("the Amgen Plan") and the Retirement and Savings Plan for Amgen Manufacturing, Ltd. ("the AML Plan")[1] (collectively, "the Plans").

On February 1, 2008, the Court dismissed Harris' claims for lack of standing as a "plan participant" as well as the balance of the complaint for failure to name the proper plan fiduciaries. *See* Order Granting Defendants' Motion to Dismiss (Dkt. # 48). The Court denied Harris' and Ramos' request for leave to amend. *See id.* at 11. However, the Ninth Circuit reversed, holding that (1) subsequent case law conferred standing on individuals who have received the full distribution from a plan and (2) Harris and Ramos should be granted leave to amend "to challenge the proper defendants and to present any viable claim." *Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009).

On November 12, 2009, Plaintiffs Harris, Ramos, Jorge Torres, and Albert Cappa (collectively, "Plaintiffs") filed a Class Action Consolidated Complaint ("Complaint") against (1) Amgen and AML ("the Entity Defendants")[2], (2) members of the Amgen Board of Di-

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[1] Amgen Manufacturing, Ltd. ("AML") is a wholly-owned subsidiary of Amgen. *See Compl.* ¶ 25.

[2] The Court notes that Plaintiffs do not identify AML as a defendant on the caption page of the Complaint. *See* Fed. R. Civ. P. 10(a) (requiring that the title page of a complaint "name all the parties"). However, Plaintiffs do include AML in the discussion of the parties. *See Compl.* ¶ 25; *see also Opp.* (including AML on the cover sheet of Plaintiffs' Opposition). Thus, it is clear that Plaintiffs intended to assert claims against AML, and the Court will treat AML as a defendant in the action. *See Silvis v. Cal. Dept. of Corrs.*, No. 07-0332, 2009 WL 806870, at *1 (E.D. Cal. Mar.26, 2009).

rectors ("the Director Defendants")[3], (3) Amgen officers ("the Individual Defendants")[4], (4) the Global Benefits Committee ("GBC") of the Amgen Plan, and (5) and the Fiduciary Committee (collectively, "Defendants").[5]

The Amgen Plan is an employee pension benefit plan for Amgen employees pursuant to §§ 3(2)(A) and 3(3) of ERISA, 29 U.S.C. §§ 1002(2)(A), (3), and is an eligible individual account plan ("EIAP") under § 407(d)(3)(A) of ERISA, 29 U.S.C. § 1107(d)(3) (A). *See Compl.* ¶¶ 71, 79. Similarly, the AML Plan is an employee pension benefit plan for AML employees pursuant to §§ 3(2)(A) and 3(3) of ERISA, 29 U.S.C. §§ 1002(2)(A), (3), and is also an EIAP. *See id.* ¶¶ 71, 84. The Plans permit plan participants to select from various investment options, including an option to invest in the Amgen Inc. Common Stock Fund. *See id.* ¶¶ 2, 76.

Plaintiffs allege that from May 4, 2005 to March 9, 2007 ("the Class Period"), Defendants concealed the negative results of clinical studies of the Amgen drug Aranesp®, including a study by the Danish Head and Neck Cancer Group ("DAHANCA"). *See id.* ¶¶ 110-147. During this time, Defendants also allegedly marketed Aranesp® and another Amgen drug, Epogen®,

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[3] The Director Defendants are Frank J. Biondi, Jerry D. Choate, Frank C. Herringer, Gilbert S. Omenn, David Baltimore, Judith C. Pelham, Kevin W. Sharer, Frederick W. Gluck, and Leonard D. Shaeffer.

[4] The Individual Defendants are Robert A. Bradway, Dennis M. Fenton, Richard Nanula, and Charles Bell.

[5] The Complaint alleges facts similar to those alleged in the original complaint and those alleged in a parallel securities class action (CV 07-2536 PSG).

for "off-label" uses that they allegedly knew were risky while at the same time they purported to market the drugs for uses consistent with the FDA label. *See id.* ¶¶ 148-175. Eventually, the negative results of the DAHANCA study were published in *The Cancer Letter* on February 16, 2007, *see id.* ¶ 179, and Amgen subsequently revealed that the Securities and Exchange Commission had opened an inquiry into the DAHANCA trial, *see id.* ¶ 237. Finally, on March 9, 2007, the FDA mandated a "black box" warning concerning the risks of "off label" uses of Aranesp® and Epogen®. *See id.* ¶ 238. As a result of the alleged misconduct, Amgen stock "lost a significant amount of its value." *Id.* ¶ 244-45.

Plaintiffs claim that Defendants are liable for these losses as fiduciaries of the Plans. Defendants allegedly breached numerous fiduciary duties by permitting plan participants to continue investing in the Amgen Inc. Common Stock Fund when Defendants knew of the health risks associated with Aranesp® and marketed Aranesp® and Epogen® for "off label" uses. In the Complaint, Plaintiffs assert claims for (1) breach of the fiduciary duty of loyalty, (2) breach of the fiduciary duty of care, (3) breach of the fiduciary duty to provide complete and accurate information, (4) breach of the fiduciary duty to monitor, (5) co-fiduciary liability, and (6) "party-in-interest" liability. On December 16, 2009, Defendants filed a motion to dismiss for failure to state a claim under Rule 12(b)(6).

II. Legal Standard

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss a cause of action if the plaintiff fails to state a claim upon which relief can be granted. In evaluating the sufficiency of a

complaint under Rule 12(b)(6), courts must be mindful that the Federal Rules of Civil Procedure require that the complaint merely contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although detailed factual allegations are not required to survive a Rule 12(b)(6) motion to dismiss, a complaint "that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, —U.S.—, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

In resolving a Rule 12(b)(6) motion, the Court must engage in a two-step analysis. *See id.* at 1950. The Court must first accept as true all non-conclusory, factual allegations made in the complaint. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993). Based upon these allegations, the Court must draw all reasonable inferences in favor of the plaintiff. *See Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949 (9th Cir. 2009). To further the inquiry, the Court may consider extrinsic documents that are either subject to judicial notice, or are referred to or necessarily relied upon in the complaint and where their authenticity has not been questioned. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."); *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of*

Santa Clara, 307 F.3d 1119 (9th Cir. 2002); *see also Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), *superseded by statute on other grounds.*

After accepting as true all non-conclusory allegations and drawing all reasonable inferences in favor of the plaintiff, the Court must then determine whether the complaint alleges a plausible claim to relief. *See Iqbal*, 129 S. Ct. at 1950. In determining whether the alleged facts cross the threshold from the possible to the plausible, the Court is required "to draw on its judicial experience and common sense." *Id.* "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.*

III. Discussion

Defendants move to dismiss the Complaint under Rule 12(b)(6) for failure to state a claim. On January 15, 2010, Plaintiffs filed a timely Opposition to the motion, and Defendants filed a timely Reply on January 29, 2010. The Court will (1) decide whether to grant Defendants' request for judicial notice, (2) determine whether Plaintiffs have identified the proper Defendants, and (3) address each count asserted in the Complaint.

A. The Court Considers Defendants' Exhibits

Defendants request that the Court take judicial notice of 15 exhibits attached to the Request for Judicial Notice. *See RJN* 1-2. Plaintiffs filed an objection to the request in its entirety on the grounds that all exhibits are not properly subject to judicial notice, contain inadmissible hearsay, and have not been authenticated. *See Pls.' Obj. to Defs.' Request for Judicial Notice and*

Mot. to Strike (*"Obj."*), at 1:12-14. Furthermore, Plaintiffs specifically object to Exhibits 1, 2, 3, 5, 6, 9, 11, 12, 13, and 15 on the grounds that these exhibits were not explicitly referenced in the Complaint. *See id.* at 1:8-12. In the Objection, Plaintiffs also include a Motion to Strike Unsupported Factual Allegations. *See id.* at 9:27-10:20.

Defendants counter that the Court has already taken judicial notice of Exhibits 1-11 (in the February 1, 2008 Order) and that the Court should simply take judicial notice of these documents again. *See Response to Pls.' Obj. to Defs.' Request for Judicial Notice and Mot. to Strike* (*"Response"*) 1:16-4:2. Defendants also argue that the remaining Exhibits 12-15 are properly subject to judicial notice. In the Objection, Plaintiffs do not argue that the documents are inaccurate in any respect. For the reasons that follow, the Court overrules Plaintiffs' objections and considers Exhibits 1-15 when necessary.

1. The Court Has Taken Judicial Notice of Exhibits 1-3 and 10-11

In the Court's February 1, 2008 Order granting Defendants' motion to dismiss, the Court took judicial notice of Exhibits 1-4[1] and 10-11 because they were "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see* Dkt. #48, at 3 (citing Fed. R. Evid. 201(b)). Plaintiffs did not object to the earlier request for judicial notice and, thus, waived any objections to the Court taking judicial notice of these

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[1] Defendants concede that Exhibit 4 is not identical to the exhibit that the Court previously judicially noticed. *See* Response 3 n. 3. Thus, Plaintiffs did not waive objection to Exhibit 4.

exhibits. *See* Fed. R. Evid. 201(e) (allowing an opportunity to object to a request or taking of judicial notice upon a "timely request"); *see also Response* 2:20-27 (arguing that Plaintiffs' objections to Exhibits 1-11 constitute "a disguised motion for reconsideration of the Court's February [1], 2008 Order"). As Plaintiffs have waived objection, the Court takes judicial notice of Exhibits 1-3 and 10-11: the Aranesp® label from the FDA website (Ex. 1), the Epogen® label from the FDA website (Ex. 2), a LexisNexis report of Amgen's daily stock price between April 1, 2004 and October 31, 2007 (Ex. 3), *The Cancer Letter* (Ex. 10), and the September 28, 2007 analyst report by Bernstein Research (Ex. 11).

2. The Court Considers Exhibits 5-9 and 13-14 Under the Doctrine of Incorporation by Reference

Defendants ask the Court to take judicial notice of Exhibits 5-9 and 13-14 ("the plan documents"). In the prior Order, the Court considered documents identical to Exhibits 5-9 because Plaintiffs relied upon the plan documents in the Complaint and did not question their authenticity. *See* Dkt. #48, at 2-4. Defendants attempt to apply the waiver argument discussed above to these exhibits. *See Response* 1:17-18. However, the Court did not take judicial notice of the plan documents in the prior Order; rather, the Court considered the exhibits under the doctrine of incorporation by reference. *See* Dkt. #48 (citing *Parrino*, 146 F.3d at 706). Therefore, although Plaintiffs did not object to Exhibits 5-9 during the Court's consideration of the prior motion to dismiss, Plaintiffs did not waive objection under Fed. R. Evid. 201(e).

In the prior Order, the Court considered Exhibits 5-9 because Plaintiffs did not question their authentici-

ty. However, now facing a second motion to dismiss, Plaintiffs claim that "Defendants fail to authenticate these documents by anyone with knowledge that they are indeed what they purport to be." *Obj.* 4:7-9. Plaintiffs also include the plan documents in their blanket hearsay and authentication objections. *See id.* 1:12-14 ("Plaintiffs also object to Exs. 1-15 on the grounds that they are not properly subject to judicial notice, contain inadmissible hearsay, have not been authenticated and their accuracy and reliability have not been established."). Despite Plaintiffs' objections, the plan documents are not hearsay because they are being offered to establish the terms of the Plans. *See Stuart v. UNUM Life Ins. Co. of Am.*, 217 F.3d 1145, 1154 (9th Cir. 2000) (finding that a contract constitutes a "verbal" act that is "excluded from the definition of hearsay and is admissible evidence because it is a legally operative document that defines the rights and liabilities of the parties"). Furthermore, the Court has sufficient information "to support a finding that [each plan document] is what its proponent claims." *See* Fed. R. Evid. 901(a). Defendants' counsel signed the RJN and attests that the "documents attached herein are true and correct copies." *See RJN* 1:7, 6:14. Indeed, at the hearing on the motion, Plaintiffs' counsel conceded that the plan documents are not inaccurate. Accordingly, the Court considers the plan documents under the doctrine of incorporation by reference.

3. The Court Takes Judicial Notice of Exhibits 4, 12, and 15

Pursuant to Fed. R. Evid. 201(b), the Court takes judicial notice of portions of Amgen's SEC Form 10-K filings (Ex. 4), a LexisNexis report of Amgen's daily stock price from January 2, 2008 to December 31, 2008 (Ex. 12), and BrightScope's 2009 Top 30 401k Plans List

("the BrightScope List") (Ex. 15). The Court takes judicial notice of Exhibit 4 (a slightly altered version of an exhibit judicially noticed in the prior motion) because the exhibit contains SEC filings. *See Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n. 2 (9th Cir. 2006) (noting that courts "may consider documents referred to in the complaint or any matter subject to judicial notice, *such as SEC filings*"). The Court also takes judicial notice of Exhibit 12—the report of Amgen's stock price during the Class Period—because this document is capable of ready determination. *See Plevy v. Haggerty*, 38 F. Supp. 2d 816, 821 (C.D. Cal. 1998) (noting that "the stock price of a publicly-traded company is proper subject matter for judicial notice"). Finally, the Court takes judicial notice of the BrightScope List (Ex. 15) because it is capable of ready determination by consulting BrightScope's website. For these reasons, the Court takes judicial notice of all the exhibits contained in the Request for Judicial Notice. Plaintiffs' motion to strike is DENIED insofar as the motion pertains to factual allegations substantiated by Exhibits 1-15.

B. Allegations of Defendants' Fiduciary Status

Only fiduciaries can be held liable for breach of fiduciary duty under ERISA. *See Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1101 (9th Cir. 2004). In granting Defendants' prior motion to dismiss, the Court found that Harris and Ramos failed to allege that certain defendants were fiduciaries of the AML Plan. *See* Dkt. #48, at 8-11. In the Ninth Circuit opinion reversing the dismissal, the court stated:

> Plaintiffs' remaining claims were dismissed because they misidentified the proper fiduciary defendants. Although Plaintiffs did not name the Fiduciary Committee as a defendant, they

> did name a Retirement Benefits Committee, which they thought served the same fiduciary functions. Also, Plaintiffs identified Amgen as the named fiduciary of the Manufacturing Plan, when in fact Amgen Manufacturing is the named fiduciary of that plan. In both cases, Plaintiffs would have sued the proper fiduciary but for a misidentification of the correct defendant, and their claims against Amgen Manufacturing and the Fiduciary Committee can be saved by amendment.

Harris, 573 F.3d at 737. Plaintiffs have returned with a new Complaint, asserting claims against new defendants whom Plaintiffs allege to be fiduciaries of the Plans. Again, Defendants argue that Plaintiffs have failed to sue the proper defendants and that, thus, the claims against Amgen, AML, the Director Defendants, and the Individual Defendants must be dismissed. *See Mot.* 25:20-21.

1. The Entity Defendants

A named fiduciary can delegate its fiduciary responsibilities to an administrator under ERISA and thereby limit liability for any subsequent breaches of fiduciary duties by the designee. *See* 29 U.S.C. § 1105(c); *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir. 1985) ("Although employees of [a corporate entity] serve on the Employee Benefits Committee and the Committee has a fiduciary responsibility in determining claims, this does not make the employer a fiduciary with respect to the Committee's acts. ERISA anticipates that employees will serve on fiduciary committees but the statute imposes liability on the employer *only when and to the extent that the*

employer himself exercises the fiduciary responsibility allegedly breached." (emphasis added)).

a. Amgen

Plaintiffs allege that Amgen is the "Plan Sponsor and Administrator and is a 'named fiduciary of the Plans.'" *See Compl.* ¶ 24. Defendants argue that Amgen delegated its fiduciary responsibilities under the Amgen Plan, as permitted under ERISA. *See Mot.* 24:20-23 (citing *RJN*, Ex. 5).[7] Under the Amgen Plan, Amgen is the "named fiduciary," but Amgen delegated its responsibilities to the GBC and the Fiduciary Committee. *See RJN*, Ex. 5, at 207 ("To the extent that the Plan requires an action under the Plan to be taken by the Company [Amgen], the party specified in this Section 15.1 shall be authorized to act on behalf of the Company."); *id.* at 208 (authorizing the GBC and the Fiduciary Committee to assume administrative responsibilities of the Plan). Thus, Amgen apparently delegated its fiduciary responsibilities under the Amgen Plan.

Plaintiffs also argue in the Opposition that Amgen was a fiduciary of the Plans because its Board exercised authority over the Plans, and the actions of other fiduciaries can be imputed to Amgen under the doctrine of *respondeat superior*. *See Opp.* 7 n. 9. However, this argument is inconsistent with the core principle of ERISA that "employees will serve on fiduciary com-

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[7] The Court notes that Defendants' general citations to the exhibits are unacceptable. The Amgen Plan alone is 52 pages long. *See RJN*, Ex. 5. The Court should not have to search through hundreds of pages of exhibits because, as other courts have observed, "[j]udges are not like pigs, hunting for truffles buried in briefs." *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (citation omitted).

mittees but [that] the statute imposes liability on the employer only when and to the extent that the employer [itself] exercises the fiduciary responsibility allegedly breached." *See Gelardi*, 761 F.2d at 1325. Thus, Amgen cannot be held liable for breach of fiduciary duty under the doctrine of *respondeat superior*. *See Tool v. Nat. Employee Benefit Servs., Inc.*, 957 F. Supp. 1114, 1121 (N.D. Cal. 1996).

Additionally, Amgen is not apparently a fiduciary of the AML Plan. According to the AML Plan, only AML is designated as the "named fiduciary" of the AML Plan. *See RJN*, Ex. 7, at 312 (naming only the "Company" as the "named fiduciary" of the AML Plan); *id.* at 269 (defining the "Company" as "Amgen Manufacturing, Limited, a Bermuda corporation and any successor thereto"). Accordingly, the Court GRANTS Defendants' motion to dismiss as to Amgen without prejudice.

b. AML

Plaintiffs allege that AML was the "named fiduciary" of the AML Plan. *See Compl.* ¶ 25. Defendants cite Exhibit 7 (the AML Plan) to argue that AML delegated its fiduciary responsibilities "to trustees and investment managers, and their responsibilities as plan sponsors and named fiduciaries to the Fiduciary Committee." *Mot.* 24:20-23.[8] As discussed, AML is the "named fiduciary" of the AML Plan. *See RJN*, Ex. 7, at 312; *id.* at 269. The AML Plan further indicates that AML is a fiduciary "only to the extent of having the au-

[8] Defendants cite generally to Exhibit 7, a 50-page document. At the hearing, Defendants' counsel offered to provide the Court with a specific page reference. However, to date, Defendants' counsel has not provided the reference to the Court.

thority (a) to appoint one or more Trustees to hold assets of the Plan in trust ..., (b) to appoint one or more insurance companies ... to hold assets of the Plan ..., (c) to appoint one or more Investment Managers for any assets of the Plan ..., and (d) to direct the investment of any Plan assets not assigned ...." *Id.* at 310. It is not clear from the plan documents, however, that AML actually delegated its fiduciary responsibilities. Therefore, Plaintiffs' claims will not be dismissed as to AML on this ground.

2. The Director Defendants

Defendants argue that Plaintiffs fail to allege that the Director Defendants were fiduciaries of the Plans. *See Mot.* 24:27-25:5. Plaintiffs allege that the Director Defendants were *de facto* fiduciaries of the Plans because they "exercised discretionary authority with respect to: (i) the management and administration of the Plans; or (ii) the management and disposition of the Plans' assets." *See Compl.* ¶¶ 26-35. However, these allegations are legal conclusions that lack a sufficient factual basis. *See In re Calpine Corp. ERISA Litig.*, No. 03-1685, 2005 WL 1431506, at *3 (N.D. Cal. Mar.31, 2005) ("While plaintiff has mimicked the language of 29 U.S.C. § 1002(21)(A), he does not provide factual allegations in support of this conclusion sufficient to support a finding that the Director Defendants are *de facto* fiduciaries on this basis."); *see also Iqbal*, 129 S. Ct. at 1949. Though Plaintiffs add some factual allegations with respect to the Director Defendants' job duties, *see Compl.* ¶¶ 26-36 (noting that the Director Defendants approved an amendment to the Plans filed with the SEC), these allegations appear to pertain to their general corporate functions as opposed to any specific fiduciary responsibilities.

Plaintiffs offer another argument with respect to the Amgen Plan. Plaintiffs allege that the Director Defendants committed an *ultra vires* act by directly appointing the Fiduciary Committee. According to Plaintiffs, the Director Defendants were obligated to appoint the GBC, which was in turn required to appoint the members of the Fiduciary Committee. *See Opp.* 8:6-83. Plaintiffs claim that in directly appointing the members of the Fiduciary Committee, the Director Defendants committed an *ultra vires* act, thereby exposing them to individual liability for breach of fiduciary duty under ERISA. *See Opp.* 8:10-14; *see also Compl.* ¶¶ 42-44. The Court, however, is not persuaded by this argument. In the Complaint, Plaintiffs offer contradictory allegations about whether the GBC was ever constituted. *Compare Compl.* ¶ 42 (alleging that the GBC "was a committee appointed by the Amgen Board of Directors or one of its duly appointed delegates"), *with id.* ¶ 87 (alleging that the Amgen Board of Directors directly appointed the Fiduciary Committee to oversee the operation of the Plans).[9] Moreover, Plaintiffs pro-

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[9] Plaintiffs cite to a string of paragraphs in the Complaint that purport to contain allegations that, under the Amgen Plan, the role of the Fiduciary Committee fell to the Director Defendants due to the apparent bypass of the GBC. However, the cited paragraphs do not specifically allege that the Director Defendants are individually liable for committing the alleged *ultra vires* act. *See Compl.* ¶ 87 (alleging that the Amgen Board of Directors directly appointed the Fiduciary Committee to oversee the operation of the Plans); *id.* ¶ 90 (alleging that the Individual Defendants were fiduciaries of the AML Plan); *id.* ¶ 329 (alleging that the Director Defendants appointed the Fiduciary Committee, and that the Fiduciary Committee and its members were responsible for managing the Plans' investments); *id.* at 353 (alleging that the Director Defendants breached their duty to monitor the members of the Fiduciary Committee); *id.* at 356 (same).

vide no authority supporting their contention that the alleged *ultra vires* act subjects the Director Defendants to individual liability for the alleged breaches. Thus, the Director Defendants are not liable under the Amgen Plan on this ground.

With respect to the AML Plan, the Board of Directors is permitted to appoint the members of the Fiduciary Committee directly. Plaintiffs claim that the Director Defendants are liable for breaches associated with the AML Plan because the Director Defendants allegedly failed to duly appoint the Fiduciary Committee. *See Opp.* 8:14-18. As with their allegations concerning the Amgen Plan, however, Plaintiffs offer conclusory allegations that the Director Defendants were fiduciaries of the AML Plan. Even assuming that Director Defendants failed to properly constitute the Fiduciary Committee, Plaintiffs do not sufficiently allege that Director Defendants would be liable individually for the specific breaches alleged in the Complaint. Thus, Plaintiffs have failed to allege that the Director Defendants were fiduciaries of the AML Plan.

Nevertheless, Plaintiffs may have sufficiently alleged that one of the Director Defendants, Kevin W. Sharer ("Sharer"), was a fiduciary of the Amgen Plan. Plaintiffs allege that "upon information and belief, [Sharer] was a member of the Defendant Plan Fiduciary Committee." *Compl.* ¶ 32. As Defendants note, "In this regard, the *only* Individual Defendant alleged, *upon information and belief*, to have served as a member of the Fiduciary Committee is Kevin Sharer." *Opp.* 5:3-5 (emphasis in original). Though Defendants claim that Sharer "never served on the Fiduciary Committee" and that Plaintiffs have known this fact for two years, the Court will not dismiss the claims against Sharer on this basis. Therefore, the Court GRANTS Defendants' mo-

tion to dismiss as to Defendants Frank J. Biondi, Jerry D. Choate, Frank C. Herringer, Gilber S. Omenn, David Baltimore, Judith C. Pelham, Frederick W. Gluck, and Leonard D. Shaeffer without prejudice.

3. The Individual Defendants

Plaintiffs fail to allege with sufficient specificity how the Individual Defendants breached their purported fiduciary duties. *See In re McKesson HBOC, Inc. ERISA Litig.*, No. 00-20030, 2002 WL 31431588, at *17 (N.D. Cal. Sept. 30, 2002) ("[P]laintiffs shall identify the breaches of fiduciary duty, identify the defendants with knowledge of the breaches, identify ... specifically how each defendant failed to take reasonable efforts to remedy the breach, and identify what acts the specific defendants took to conceal information."). Accordingly, the Court GRANTS Defendants' motion to dismiss as to the Individual Defendants without prejudice.

4. The GBC and the Fiduciary Committee

Defendants do not contest Plaintiffs' allegations that the GBC and the Fiduciary Committee were ERISA fiduciaries. Therefore, the claims remain against only AML, Sharer, GBC, and the Fiduciary Committee.

C. Plaintiffs' Claims

The Court will now evaluate the six counts against the remaining Defendants.

1. Breach of the Duty of Loyalty (Count I)

Plaintiffs assert a claim for breach of the fiduciary duty of loyalty pursuant to § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). *See Compl.* ¶¶ 304-318. Plaintiffs allege that Defendants were under a fiduciary obligation to avoid conflicts of interest, and that they violated that

obligation by failing to appoint independent fiduciaries and failing to notify federal agencies that Amgen stock was no longer a suitable investment for the Plans. *See id.* ¶¶ 308-309. Plaintiffs further allege that Defendants did not take such preventive measures because their compensation included Amgen stock, and eliminating the Amgen investment option "would have sent a negative signal to Wall Street analysts, which in turn would result in reduced demand for Amgen stock and a drop in the stock price." *Id.* ¶ 313. Finally, Plaintiffs claim that Defendants continued to market "off label" uses for Aransep® and Epogen® despite their knowledge of the health risks because Defendants' stood to gain from increased sales of the drugs. *See id.* ¶ 315.

Plaintiffs allegations all relate to the potential conflict of interest affecting plan fiduciaries who also received compensation from Amgen in the form of company stock. However, such allegations are insufficient to state a claim for beach of the fiduciary duty of loyalty under ERISA. *See In re Syncor ERISA Litig.*, 351 F. Supp. 2d 970, 987-88 (C.D. Cal. 2004) (noting that "[u]nder this theory, corporate defendants would always have a conflict of interest"); *In re Citigroup ERISA Litig.*, No. 07-9790, 2009 WL 2762708, at *26 (S.D.N.Y. Aug. 31, 2009) (holding that allegations that the defendants' compensation was "tied to the performance of Citigroup stock" were insufficient to state an actionable claim for conflict of interest); *In re WorldCom*, 263 F. Supp. 2d 745, 768 (S.D.N.Y. 2003) (holding that allegations that the defendant owned shares of WorldCom stock were insufficient to establish an actionable conflict of interest). Indeed, ERISA explicitly permits a corporate officer, employee, or agent to serve as a plan fiduciary. *See* 29 U.S.C. § 1108(c)(3) ("Nothing

in section 1106 of this title shall be construed to prohibit any fiduciary from ... serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest."). Therefore, the Court GRANTS Defendants' motion to dismiss Plaintiffs' claim for breach of the fiduciary duty of loyalty without prejudice.

2. Breach of the Duty of Care (Count II)

Plaintiffs assert a claim for breach of the fiduciary duty of care against all Defendants. Plaintiffs allege that continuing to provide Amgen stock as an investment option under the Plans was "imprudent" because Defendants knew of the negative studies of Aranesp® and knew that continued marketing of "off label" uses of the drugs would ultimately harm the price of Amgen stock. *See Compl.* ¶¶ 319-334. Though fiduciaries of an EIAP are exempted from ERISA's duty to diversify, *see* 29 U.S.C. § 1104(a)(2), they are still obligated to "act with care, skill, prudence, [and] diligence," *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1002 (9th Cir. 2008). When evaluating the prudence of an ERISA fiduciary's actions, courts are divided over whether to apply a presumption of prudence or a "prudent man" standard. Thus, the Court will examine Plaintiffs' claims under each standard.

a. Plaintiffs Fail to Rebut the Presumption of Prudence

Under the "*Moench* standard," plan fiduciaries are entitled to a presumption of prudence, unless the plaintiff alleges sufficient facts to rebut the presumption. Courts commonly refer to this test as the "*Moench* standard," named after the Third Circuit case that first employed a presumption of prudence in the ERISA context. *See Moench v. Robertson*, 62 F.3d 553 (3d Cir.

1995). Though the Ninth Circuit has yet to formally adopt the *Moench* standard, *see Wright*, 360 F.3d at 1098 n. 3 ("[W]e decline at this juncture to adopt wholesale the *Moench* standard."); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1002 (9th Cir. 2008) ("As an initial matter, this Circuit has not yet adopted the *Moench* presumption, and we decline to do so now."), the Circuit has also declined to *reject* the *Moench* standard. In fact, the two Ninth Circuit cases that declined to adopt the *Moench* standard proceeded to apply it. *See Wright*, 360 F.3d at 1098 ("Though Plaintiffs contend that the district court prematurely dismissed their claims at the motion to dismiss stage, Plaintiffs' alleged facts effectively preclude a claim under *Moench*, eliminating the need for further discovery."); *Synchor*, 516 F.3d at 1102 (holding, "in any event," that "the district court's determination that the Class did not rebut the *Moench* presumption based solely upon Synchor's financial viability ... is not an appropriate application of the prudent man standard set forth in either *Moench* or 29 U.S.C. § 1004").

To varying degrees, district courts in this Circuit have applied the *Moench* standard. *See, e.g., Calpine*, 2005 WL 1431506; *In re Computer Sciences Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1133 (C.D. Cal. 2009) (applying the *Moench* presumption in addition to the "prudent man" standard). Additionally, the First, Fifth, and Sixth Circuits have followed the Third Circuit and adopted the *Moench* standard. *See Bunch v. W.R. Grace & Co.*, 532 F. Supp. 2d 283, 289 (D. Mass. 2008), *aff'd by* 555 F.3d 1 (1st Cir. 2009); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 254 (5th Cir. 2008); *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995). Even in circuits that have not formally adopted the *Moench* standard, district courts have applied the pre-

sumption of prudence. *See, e.g., In re Lehman Brothers Sec. & ERISA Litig.*, No. 08-5598, 2010 WL 354937, at *5 (S.D.N.Y. Feb. 2, 2010) ("ERISA requires plan fiduciaries to manage plan assets prudently.... While the Second Circuit has not specifically addressed the *Moench* decision, *Moench* is persuasive, and many courts in this district have adopted it ....").

Under the *Moench* standard, fiduciaries of an EIAP[10] are entitled to a presumption of prudence at the motion to dismiss stage, unless "the ERISA fiduciary could not have believed reasonably that continued adherence to the [plan's terms] was in keeping with the settlor's expectations of how a prudent trustee would operate." *See Wright*, 360 F.3d at 1097 (quoting *Moench*, 62 F.3d at 571). The presumption of prudence may be rebutted by allegations that the fiduciaries were aware that the "company's financial condition is seriously deteriorating and [that] there is a genuine risk of insider self-dealing," *id.* at 1098, or that "the company is on the brink of collapse or undergoing serious mismanagement," *id.* (quoting *LaLonde v. Textron, Inc.*, 270 F. Supp. 2d 272, 280 (D.R.I. 2003)).

In this case, it is undisputed that the Plans are EIAPs. *See Compl.* ¶¶ 79, 84. Thus, under the *Moench* standard, Defendants are entitled to a presumption of prudence. Furthermore, Plaintiffs have failed to rebut

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[10] While originally applied to Employee Stock Ownership Plans ("ESOPs"), the *Moench* standard applies equally to fiduciaries of EIAPs. *See Edgar v. Avaya, Inc.*, 503 F.3d 340, 347 (3d Cir. 2007) ("[The plaintiff] argues that *Moench*'s presumption of prudence does not apply here, because the Plans at issue in this case are not ESOPs. We are not persuaded.... Given the[] similarities [between ESOPs and EIAPs], we conclude that the underlying rationale of *Moench* applies equally here." (internal citation omitted)).

the presumption. They do not allege that Amgen was in a seriously deteriorating financial condition or was "on the brink of collapse." It is telling that Plaintiffs allege that "Amgen's off-label drug sales for Aranesp® and EPOGEN were *on the brink of collapse* as a result of Defendants' *serious mismanagement*," *see Compl.* ¶ 244 (emphasis added), because it appears that Plaintiffs are attempting frame their allegations in an effort to rebut the presumption of prudence. However, Plaintiffs must allege that the company—and not merely two of its products—was in a dire financial situation. *See LaLonde*, 270 F. Supp. 2d at 280 (noting that evidence of a "precipitous decline in the employer's stock" can rebut the presumption of prudence if "combined with evidence that the *company* is on the brink of collapse or undergoing serious mismanagement." (emphasis added)).

In the Opposition, Plaintiffs offer a district court case from New Jersey, *In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, No. 05-1151, 2009 WL 790452 (D.N.J. Mar. 23, 2009), to argue that Defendants acted imprudently by continuing to offer Amgen stock during the Class Period. *See Opp.* 4:7-17. In *Merck*, plan fiduciaries allegedly failed to disclose problems regarding the safety of its popular cardiovascular drug, Vioxx. *See id.* at *3. Due to safety concerns, Merck withdrew Vioxx from the market, causing the price of Merck stock to "plunge" 27% on the day the withdrawal was announced. *See id.* at *2. The price of Merck stock continued to slide an additional 13% over the following month. *See id.* As a result, participants in several Merck employee benefit pension plans sued Merck fiduciaries for failing to manage plan investments prudently as required under ERISA. *See id.* at *3. The court in *Merck* held that the plaintiffs adequately stated a

claim for imprudent investment. In applying the *Moench* standard adopted in the circuit, the court found that the plaintiffs rebutted the presumption of prudence by adequately alleging that Merck was in a "dire situation." *See id.* at *4 (noting that the stock price "plunged by almost 40% following the withdrawal of Vioxx").

While the *Merck* case shares some similarities with this case, *Merck* is distinguishable in several material respects. First, *Merck* involved a sudden and dramatic decline in the price of company stock (27% in a single day and 40% overall during the month following the withdrawal of Vioxx). While the price of Merck stock "plunged" during a very short period of time, the price of Amgen stock exhibited a gradual decline of 29% during a period of approximately one and a half years. *See RJN*, Ex. 3, at 101-17. Indeed, Plaintiffs allege that Amgen stock dropped by 2.3% on the day *The Cancer Letter* published the DAHANCA trial results, a relatively modest drop when compared with the 27% drop in Merck stock the day Vioxx was withdrawn. *See Compl.* ¶ 237. Second, *Merck* involved the complete withdrawal of Vioxx from the market, while Aranesp® and Epogen® remained on the market despite the DAHANCA trial results and black label warnings. In light of these distinctions, Plaintiffs fail to sufficiently allege that Amgen was in a dire financial condition to rebut the presumption of prudence.

In the Opposition, Plaintiffs also argue that Amgen was "seriously mismanaged." However, the alleged management problems relate only to Amgen's development and marketing of Aranesp® and Epogen® rather than the management of the company as a whole. Thus, Plaintiffs' allegations of mismanagement associated with Aranesp® and Epogen® are insufficient to

rebut the presumption of prudence. Furthermore, it is unclear that allegations of serious mismanagement alone are sufficient to rebut the presumption of prudence. *See Calpine*, 2005 WL 1431506, at *5 n.6 ("Wright does not hold that allegations of mismanagement are sufficient to rebut the presumption of prudence."); *id.* (characterizing *LaLonde*'s addition of "serious mismanagement" to the ways in which the presumption may be rebutted as mere dictum (citing *LaLonde*, 270 F. Supp. 2d at 280)); *see also In re Fremont Gen. Corp. Litig.*, 564 F.Supp.2d 1156, 1158 (C.D. Cal. 2008) ("The Complaint in this case contains detailed and specific allegations that Fremont General was in dire financial circumstances *and* subject to serious mismanagement ...." (emphasis added)).

In contrast to Plaintiffs' allegations, Defendants have provided evidence that Amgen was in a relatively stable financial condition. *See RJN*, Ex. 4 (Amgen's 2006-2008 Form 10-K filings with the SEC); *see also Calpine*, 2005 WL 1431506, at *6 ("Plaintiff has not alleged and, given the financial statements before the Court, cannot allege facts rebutting the presumption of prudence arising under *Wright*."). In *Calpine*, the court took judicial notice of the defendant corporation's financial statements, which showed steady revenue and profitability. *See* 2005 WL 1431506, at *5. The court analogized to the Ninth Circuit's decision in *Wright*, 360 F.3d at 1098-99, and held that the plaintiffs did not rebut the presumption of prudence in light of the evidence of the company's financial viability. Similarly, Defendants have presented evidence of Amgen's stock price during the Class Period (*see RJN*, Ex. 3) and after the Class Period (*see RJN*, Ex. 12), as well as Amgen's 10-K Forms for 2006-2008 (*see RJN*, Ex. 4). Defendants note that the price of Amgen stock declined

29% from a high of $86.17 on September 19, 2005 to $60.86 at the close of the Class Period on March 9, 2007, and that decreases of far greater than 29% have been insufficient to rebut the presumption of prudence. *See Mot.* 12:5-11 (citing numerous cases).[11]

Therefore, under the *Moench* standard, Plaintiffs' claim for breach of the fiduciary duty of care must be dismissed without prejudice because Plaintiffs' have not alleged sufficient plausible facts to rebut the presumption of prudence.

b. Plaintiffs Fail to Allege a Violation of the Prudent Man Standard

Even if the *Moench* standard is not applied, Plaintiffs have not sufficiently alleged that continuing to offer the Amgen investment option was imprudent. If the presumption of prudence is not applied, courts conduct a "prudent man" analysis under the statute. *See* § 1104(a)(1)(B) ("[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims ...."); *see also Computer Sciences*, 635 F. Supp. 2d at 1134. The Ninth Circuit has observed that "a myriad of circumstances" could violate the prudent man standard,

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[11] Defendants argue that the Class Period is artificially extended to include the highest point for the price of Amgen stock on September 19, 2005, even though they claim that the first alleged act of wrongdoing occurred in October 2006. *See Mot.* 12 n. 9. Defendants claim that the price of Amgen stock declined only 20% from October 2006 (when the DAHANCA trial was suspended) to March 9, 2007 (the end of the Class Period).

including the case of an apparently stable company that was engaged in an illegal scheme to inflate the price of the company's stock. *See Synchor*, 516 F.3d at 1102.

In this case, Plaintiffs have not offered sufficient allegations that the continued offering of the Amgen investment option was imprudent. If Defendants had eliminated the investment option, they would have been subject to lawsuits if the price of Amgen stock later rose. *See Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 256 (5th Cir. 2008) (noting that a "fiduciary cannot be placed in the untenable position of having to predict the future of the company stock's performance. In such a case, he could be sued for not selling if he adhered to the plan, but also sued for deviating from the plan if the stock rebounded"). Furthermore, eliminating the Amgen investment option may have violated federal securities laws because the decision would have been based on inside information. *See Wright*, 360 F.3d at 1098 n. 4 (noting that federal securities laws are inconsistent with requiring corporate officers to use "inside information for the exclusive benefit of the corporation and its employees"). The cases cited by Plaintiffs to suggest that federal securities laws did not relieve Defendants of their duty to eliminate the Amgen investment option involved allegations of criminal conduct. *See, e.g., In re Enron Corp. Sec. Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 566 (S.D. Tex. 2003); *Worldcom*, 263 F. Supp. 2d 745; *see also Syncor*, 516 F.3d at 1102. In this case, however, Plaintiffs do not provide sufficient facts to conclude that Defendants were allegedly engaged in "an illegal scheme" despite the conclusory allegations in the Complaint. *See Compl.* ¶¶ 4, 149, 177 (alleging "illegal" conduct). Indeed, Defendants note that "there have been *no* law-

suits filed against Amgen by the SEC, or any other federal agencies." *Reply* 6:15-16.

For these reasons, Plaintiffs have not alleged sufficient facts to indicate that continuing to offer the company's stock as an investment option under its EIAPs was imprudent. Therefore, the Court GRANTS Defendants' motion to dismiss Plaintiffs' claim for breach of duty of care without prejudice.

3. Breach of the Duty to Provide Complete and Accurate Information (Count III)

Plaintiffs appear to allege both an omissions theory and a misrepresentation theory with regard to Plaintiffs' claim for breach of the duty to provide complete and accurate information. *See Compl.* ¶¶ 335-345; *see id.* ¶ 341 (noting the "misrepresentations and omissions that were fundamentally deceptive concerning the prudence of investments in Amgen stock"). As currently alleged, however, Plaintiffs do not state a claim under either theory.

With regard to Plaintiffs' omissions theory—that Defendants were obligated to inform plan participants of the negative studies associated with Aranesp®—the Ninth Circuit does not recognize a general affirmative duty to disclose investment information. *See Calpine*, 2005 WL 1431506, at *7. ERISA fiduciaries are obligated to disclose information about the plan itself and only upon written request. *See* 29 U.S.C. § 1024(b)(4) ("The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated."); *Calpine*, 2005 WL 1431506, at *7 ("An affirmative

duty of disclosure arises under ERISA only when a fiduciary responds to inquiries from plan participants or promises to keep participants updated on future developments affecting the plan."); *see also Baker v. Kinsley*, 387 F.3d 649, 661-62 (7th Cir. 2004) (noting that a general duty of disclosure under ERISA would "run the risk of disturbing the carefully delineated corporate disclosure laws"). Plaintiffs fail to allege sufficient facts to establish a duty to disclose.

With regard to Plaintiffs' misrepresentations theory—that Defendants misrepresented the "off label" marketing of the drugs—Plaintiffs fail to allege individual reliance. A misrepresentation claim under ERISA requires allegations of "(a) the status as an ERISA fiduciary acting as a fiduciary; (b) a misrepresentation on the part of the defendant; (c) the materiality of that misrepresentation; and (d) *detrimental reliance by the plaintiff on the misrepresentation.*" *Computer Sciences*, 635 F. Supp. 2d at 1140 (emphasis added). As Defendants argue in the Motion, "Plaintiffs' misrepresentation claim fails as a matter of law because Plaintiffs have not even attempted to plead sufficient facts regarding the basic elements of their misrepresentation claim." *Mot.* 17:23-25.

Contrary to Plaintiffs' argument, the element of detrimental reliance is not presumed. *See Thomas v. Aris Corp. of Am.*, 219 F.R.D. 338, 342 (M.D. Pa. 2003). Plaintiffs do not provide sufficient authority for the Court to conclude that reliance is presumed in ERISA breach of fiduciary duty cases. *See Opp.* 17:13-14 (citing only the Complaint). Plaintiffs cite to a Minnesota district court opinion, *Morrison v. MoneyGram Int'l, Inc.*, 607 F. Supp. 2d 1033, 1056 (D. Minn. 2009), to argue that reliance is presumed, but they only quote a passage summarizing the plaintiff's argument as opposed

to the court's holding. *See id.* ("*Plaintiffs allege* ... that 'reliance is presumed in an ERISA breach of fiduciary duty case' ...." (emphasis added)). Moreover, the misrepresentations allegedly made in SEC filings and various press releases were made in Defendants' corporate capacity rather than any fiduciary capacity. *See Mot.* 18:13-16; *see also Calpine*, 2005 WL 1431506, at *6 (finding that the complaint failed to state a misrepresentation claim because "Plaintiff does not allege that these press releases or bond prospectuses were made or issued by defendants while acting in a fiduciary capacity or that these statements were directed to Plan participants"). For these reasons, Plaintiffs have failed to state a claim under either an omission or a misrepresentation theory. Therefore, the Court GRANTS Defendants' motion to dismiss Plaintiffs' claim for breach of the duty to provide complete and accurate information without prejudice.

4. Breach of the Duty to Monitor (Count IV)

A claim for breach of the fiduciary duty to monitor is derivative of other claims. *See Computer Sciences*, 635 F. Supp. 2d at 1144 ("[B]ecause Plaintiffs' prudence claim fails for the reasons stated above, their monitoring claim also fails."); *Calpine*, 2005 WL 1431506, at *6 ("The Court's holding dismissing Count One [for breach of the duty of care] accordingly moots Count Two [for breach of the duty to monitor] as well...."). Therefore, the Court GRANTS Defendants' motion to dismiss the claim for breach of the duty to monitor without prejudice.

5. Co-Fiduciary Liability (Count V)

A claim for co-fiduciary liability under ERISA requires sufficient allegations of an underlying breach. *See Calpine*, 2005 WL 1431506, at *8 ("Plaintiff cannot

state a claim for co-fiduciary liability without first stating a claim for breach of fiduciary duty under ERISA." (citing 29 U.S.C. § 1105(a)). As Plaintiffs have failed to state a claim for breach of fiduciary duty, Plaintiffs cannot state a claim that Defendants' are liable as co-fiduciaries. Therefore, the Court GRANTS Defendants' motion to dismiss the claim for co-fiduciary liability without prejudice.

6. "Party-in-Interest" Liability (Count VI)

Plaintiffs claim that Defendants engaged in prohibited party-in-interest transactions under § 406(a), 29 U.S.C. § 1106(a). Plaintiffs allege that Defendants offered Amgen stock as an investment option when Defendants knew that the stock price was inflated (due to the concealment of the DAHANCA study results and other misinformation provided to the market). *See Compl.* ¶¶ 373-375. However, the prohibited transactions provisions of § 406 do not apply if the "acquisition is for adequate consideration, if no commission is charged, and if the plan is an EIAP." *Johnson v. Radian Grp., Inc.*, No. 08-2007, 2009 WL 2137241, at *23 (E.D. Pa. July 16, 2009) (citing 29 U.S.C. § 1108(e)). A purchase of stock at the prevailing market rate qualifies as "adequate consideration" under § 408(e). *See id.* (dismissing a claim for engaging in a prohibited transaction under § 406(a) where "there is no allegation that a price other than the prevailing market price for [the defendant's] stock was paid by any Plan participant").

In this case, the only contested element under § 408 is the adequacy of consideration. Plaintiffs allege that Defendants caused Amgen stock to be purchased "at artificially inflated prices." *See Compl.* ¶ 375; *see also Opp.* 24:5-8. However, Plaintiffs do not allege that Amgen stock was ever purchased at a price other than

the prevailing market price (despite the allegation that the market price was inflated). Plaintiffs argue that an allegation that Amgen stock was traded at artificially high prices is sufficient to state a claim for engaging in a party-in-interest transaction, citing *In re Sears, Roebuck & Co. ERISA Litig.*, No. 02-8324, 2004 WL 407007, at *9 (N.D. Ill. Mar. 3, 2004). However, the *Sears* case is the only district court to have accepted an allegation of an artificially inflated price to take the transaction out of the § 408 exception. *See Johnson*, 2009 WL 2137241, at *23.

Other courts have found that the purchase of a publically traded security at the prevailing market rate (even if inflated) qualifies as a transaction for adequate consideration, thereby exempting the transaction from the provisions of § 406. *See, e.g., In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898, 917 (E.D. Mich. 2004); *Pietrangelo v. NUI Corp.*, No. 04-3223, 2005 WL 1703200, at *13 (D.N.J. July 20, 2005) ("[I]t is undisputed that the Plans purchased the NUI securities at market price from a qualifying national securities exchange. Therefore, Plaintiff's Section 406 claims must be dismissed."). Accordingly, the Court GRANTS Defendants' motion to dismiss the § 406 claim without prejudice.

D. Plaintiffs' Request for Leave to Amend

Plaintiffs request leave to amend to "correct any pleadings defects that may be identified by the Court." *Opp.* 25:22-23. Defendants oppose this request because "Plaintiffs have had the benefit of *three* additional plaintiffs, the resources of *three* law firms, and *more than two years* to help refine their factual and legal allegations." *Reply* 12:9-11. Although this is the second motion to dismiss in this case, it is the first occasion for

the Court to pass upon the sufficiency of Plaintiffs' allegations. Accordingly, the Court grants Plaintiffs' request for leave to amend.

IV. Conclusion

Based on the foregoing, the Court GRANTS Defendants' motion to dismiss without prejudice. Plaintiffs may file an amended consolidated complaint with 21 days of this Order. If Plaintiffs fail to file an amended consolidated complaint by March 23, 2010, the consolidated complaint will be dismissed with prejudice.

IT IS SO ORDERED.

APPENDIX D

29 U.S.C. § 1104—Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by

acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall

not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021 (i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of—

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of Title 26, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon—

(A) the earlier of—

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which—

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if—

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements

(A) In general

For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default invest-

ments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant or beneficiary—

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III

of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement—

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement—

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection—

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immedi-

ately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

29 U.S.C. § 1132—Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate

equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) of this section or under subsection (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title[1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts; or

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[1] So in original. Probably should be "subtitle"

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor—

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.

(b) **Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions**

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) Except as provided in subsections (c)(9) and (a)(6) (with respect to collecting civil penalties under subsection (c)(9)), the Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title, section 1021(e)(1) of this title, section 1021(f) of this title, or section 1025(a) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such fail-

ure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(1) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person or who fails to meet the requirements of section 1082(d)(12)(E) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 a day for each violation by any person of subsection (j), (k), or (*l*) of section 1021 of this title or section 1144(e)(3) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with subsection (i) or (m) of section 1021 of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary may assess against any plan sponsor of a multiemployer plan a civil penalty of not more than $1,100 per day—

(A) for each violation by such sponsor of the requirement under section 1085 of this title to

adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer plan which is in endangered or critical status, or

(B) in the case of a plan in endangered status which is not in seriously endangered status, for failure by the plan to meet the applicable benchmarks under section 1085 of this title by the end of the funding improvement period with respect to the plan.

(9)(A) The Secretary may assess a civil penalty against any employer of up to $100 a day from the date of the employer's failure to meet the notice requirement of section 1181(f)(3)(B)(i)(I) of this title. For purposes of this subparagraph, each violation with respect to any single employee shall be treated as a separate violation.

(B) The Secretary may assess a civil penalty against any plan administrator of up to $100 a day from the date of the plan administrator's failure to timely provide to any State the information required to be disclosed under section 1181(f)(3)(B)(ii) of this title. For purposes of this subparagraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(10) Secretarial enforcement authority relating to use of genetic information

(A) General rule

The Secretary may impose a penalty against any plan sponsor of a group health plan, or any health insurance issuer offering health insurance coverage in connection with the plan, for any failure by such sponsor or issuer to meet the require-

ments of subsection (a)(1)(F), (b)(3), (c), or (d) o section 1182 of this title or section 1181 or 1182 (b)(1) of this title with respect to genetic information, in connection with the plan.

(B) Amount

(i) In general

The amount of the penalty imposed by subparagraph (A) shall be $100 for each day in the noncompliance period with respect to each participant or beneficiary to whom such failure relates.

(ii) Noncompliance period

For purposes of this paragraph, the term "noncompliance period" means, with respect to any failure, the period—

(I) beginning on the date such failure first occurs; and

(II) ending on the date the failure is corrected.

(C) Minimum penalties where failure discovered

Notwithstanding clauses (i) and (ii) of subparagraph (D):

(i) In general

In the case of 1 or more failures with respect to a participant or beneficiary—

(I) which are not corrected before the date on which the plan receives a notice from the Secretary of such violation; and

(II) which occurred or continued during the period involved;

the amount of penalty imposed by subparagraph (A) by reason of such failures with respect to such participant or beneficiary shall not be less than $2,500.

(ii) Higher minimum penalty where violations are more than de minimis

To the extent violations for which any person is liable under this paragraph for any year are more than de minimis, clause (i) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(D) Limitations

(i) Penalty not to apply where failure not discovered exercising reasonable diligence

No penalty shall be imposed by subparagraph (A) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such penalty did not know, and exercising reasonable diligence would not have known, that such failure existed.

(ii) Penalty not to apply to failures corrected within certain periods

No penalty shall be imposed by subparagraph (A) on any failure if—

(I) such failure was due to reasonable cause and not to willful neglect; and

(II) such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such penalty knew, or exercising reasonable diligence would have known, that such failure existed.

(iii) Overall limitation for unintentional failures

In the case of failures which are due to reasonable cause and not to willful neglect, the penalty imposed by subparagraph (A) for failures shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the plan sponsor (or predecessor plan sponsor) during the preceding taxable year for group health plans; or

(II) $500,000.

(E) Waiver by secretary

In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the penalty imposed by subparagraph (A) to the extent that the payment of such penalty would be excessive relative to the failure involved.

(F) Definitions

Terms used in this paragraph which are defined in section 1191b of this title shall have the meanings provided such terms in such section.

(11) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate

enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

(12) The Secretary may assess a civil penalty against any sponsor of a CSEC plan of up to $100 a day from the date of the plan sponsor's failure to comply with the requirements of section 1085a(j)(3) of this title to establish or update a funding restoration plan.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred

to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of

the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(*l*) Civil penalties on violations by fiduciaries

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses

to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.